United States Court of Appeals

for the Second Circuit

APPENDIX

ORIGINAL
WITH PROOF
OF SERVICE

77-7121

United States Court of Appeals

FOR THE SECOND CIRCUIT

DORALEE ESTATES, INC.,
Plaintiff-Appellee,

—against—

CITIES SERVICE OIL COMPANY,
Defendant and Third Party Plaintiff-Appellant,

—against—

MGO CORP. and MONTICELLO GAS & OIL CO., INC.,
Third Party Defendants-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

JOINT APPENDIX

(Volume III of III—Pages A-926—A-1362)

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UNITED STATES COURT OF APPEALS
FILED
JUL 20 1977

PAGINATION AS IN ORIGINAL COPY

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2:35 p.m.

(Jury in the box.)

MR. ORSECK: We consent to every document, your Honor, if that will save time.

THE COURT: Let's mark them, please.

MR. COLIN: I wish Mr. Orseck would not make remarks in the presence of the jury.

THE COURT: Colloquy that bears on the merits should not be indulged in.

MR. COLIN: A question that involves disparagement of counsel --

THE COURT: Ladies and gentlemen, you are here to try the case from the evidence that is heard from the witness stand.

Please give the exhibits to the clerk to be marked.

MR. GRUBBS: I have no objection to this.

(Defendants' Exhibits DD, EE, and FF received in evidence.)

xxx

MR. COLIN: With your Honor's permission I would like to read briefly from the summaries of these two exhibits, EE and DD, relative to repeat tenants, and then I will hand this to the jury.

THE COURT: There is no point in handing that

to the jury at this point. I think we ought to go forward with the balance of the proof.

(Mr. Colin read to the jury from Defendants' Exhibits DD and EE in evidence.)

MR. COLIN: The defendant Cities Service calls Mr. Rieber, please.

W I L L I A M J. R I E B E R, called as a witness by the defendant Cities Service Co., having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

xxx BY MR. COLIN:

Q Where do you live?

A P. O. Box 334, Rock Hill, Sullivan County, New York.

Q Is your residence near the Doralee Estates property?

A Approximately ten miles.

Q What is your business, Mr. Rieber?

A I am a licensed real estate broker. I have an appraisal practice. I own and operate one credit bureau in Sullivan County and I own and operate a company called Advance Payment Corporation that is licensed by the Banking Department to finance insurance premiums. We also engage

in the business of buying and selling mortgages, dealing in land, not only on a brokerage basis but for my own account and for participation groups.

Q Have you done appraisals?

A In Sullivan County for fifteen years.

Q Have you testified before courts in connection with those appraisals?

A Yes, I have.

Q For whom have you in general done your appraising?

A I was staff appraiser of the First Federal Loan Association of Port Jervis. Prior to that I was an appraiser for Sullivan County Savings & Loan, which was merged into West Side Federal of New York. After I left their full-time employment they retained me to do their appraisal work. I appraised properties in ten counties and three states, and in recent years I confine my activities primarily for them in Sullivan County.

Q Do you own any property in the vicinity of Doralee Estates?

A I do.

Q Where is your property, sir?

A Almost directly opposite this parcel of land.

Q When you say "this parcel of land," you refer

to the Doralee parcel?

A The subject property, yes.

Q Have you, over the course of years, had occasion to be in the vicinity of the Doralee property?

A Yes. I owned property adjoining it at one time.

Q How frequently have you been on Waverly Road and Cold Spring Road?

A Probably several times a week.

Q Would you describe the development on Cold Spring Road as one approaches the Doralee property.

A As you come down Cold Spring Road, which comes from Broadway, Monticello, you have a school, and then some residences, and then you come into the industrial area. You have an older filling station and repair garage on the left, and then you have Bargain Retail Lumber Company, and opposite that you have a paint supply house and New York Sheet Metal, an oil company on the right, Monarch Oil, a garage on the left, and next to that you have Sullivan County Glass Warehouse.

Opposite that point you have a concrete plant, and then there is an abandoned sort of railroad tool house, a rusty old metal building, and then you come to, on the right-hand side, a ramshackle warehouse with rotting platforms that was part of the lumber complex at one time. There

is a building that is now used for a boiler plant where they at one time poured the sawdust.

#21 The next building is a post office, and next is a printing plant, and to the right just off Cold Spring Road you have two fairly well rundown bungalow colonies.

Next you come to Monarch Oil Company, sort of a tank farm. There are two or three large tanks right alongside the road and their warehouse.

Next, you have sort of an abandoned bottle glass plant warehouse-type thing, and to your left you have several homes. One is boarded up and two have For Sale signs. They are of modest value, maybe $10,000, $12,000 apiece.

Then you have a maintenance supply business, Leo Weiner, a substation for New York State Electric & Gas, and an abandoned night club.

The next property you have was formerly the MGO property, and they have a lot of used cars there, and some sort of a repair yard, and used car facilities.

Next you come to a bottled gas business, and around the corner from that you have car gas, another bottled gas business -- bottledgas as opposed to natural gas. We don't have natural gas in that area.

Then you have a plumbing pool supply facility there. Wechsler I believe is the name.

Qualified in Queens County

Down a little side road at that point you have an abandoned coal yard. You have a few more residences, some in very bad repair. One is the old Ed Tompkins property, and he owned two at one time.

There are a few residences, one which recently sold for $12,000, and that is the Shorter family that owned that.

Then you have a pile of sand that is probably as large as this room. That's used by the Town Highway Department. Then you have an old, rusty-type building where they keep older equipment. They have since relocated in Jefferson Street in the Village, but they still maintain this plant.

Then there is a house opposite that. It is not in very good condition. I remember I was involved with a bank and we had to foreclose. Now I see that the fireplace chimney has departed from the building. It is leaning back five or six inches towards the roof area.

On the left is the subject property, Doralee.

Opposite that is a wooded area.

Q There is another Doralee frontage on Waverly Road, is there not?

A That's correct. I have my notes. Some 400 feet.

Q Give us a similar description of the development

on Waverly Road as one approaches.

A As you leave Broadway again, which is the same street that Cold Spring Road comes from, you have some bungalow complexes there, and then you have residences on the right and on the left -- they are in various stages of repair.

Then you come to a brook, and at that point the brook feeds into the swamp where the Village has its land fill and where they have their sewer plant.

There is a burned-out building once owned by a woman by the name of Paul Wong, and then some ramshackle buildings -- some of them since torn down -- on the right-hand side, and sort of a five or six-home development which is in very bad condition. I don't know if it has been torn down but my figured in the demolition of one of the buildings. It was in bad shape. It was right opposite the Village Shop. The Village has two shops. They have one by the sewer plant.

As you go down there are some very old bungalow colony situations. I don't think many of them are rentable any more. They are pretty much dilapidated.

Opposite that, on the left-hand side, you have two very large buildings. This is just about at the village line. They are abandoned and should be torn down. I know the Village doesn't have funds for that sort of thing at the present time.

Then you come to the power line which, of course, goes across the highway at that point. The same power line goes across the back of the subject property, and then you have one or two lots on the right-hand side, and then I have frontage of 220 feet which goes back to the swamp. I have 54 acres.

The next property on the right is a trailer where a man has sort of a -- he has a garage. It is not built according to any code. It is jerrybuilt.

Then there is a very tiny cottage owned by a woman by the name of Rumsey who is quite old now. She moved two miles away into the south woods with her grandchildren and she now lives in a trailer. I don't know if there is anyone there living, but I see a dog tied up. Whether it belongs to the trailer or not --

The next property is the Doralee property where they have concrete blocks as stanchions leading up to their bungalow complex.

Q What would you say is the nature of the development on Cold Spring Road as you described it?

MR. ORSECK: I object to the form.

THE COURT: Sustained.

Q What type of structures and uses predominate, if any, on Cold Spring Road as you described it in the approach

to the Doralee property?

THE COURT: I will sustain that. The jury has heard the description. They can form their own conclusion.

MR. COLIN: Your Honor's ruling would be the same as to Waverly Road?

THE COURT: Yes.

Q What is the terrain of the Doralee property and the immediately surrounding area, sir?

A It is rolling, wooded, rocky; some parts of it are low and wet. To the back of the property it rises from fifty to sixty feet to a ledge. There is a ledge formation which starts right -- I can't think of the road. It is the road that goes to Woodcliff Avenue. Before the Monarch tank farm that ridge rolls back gradually away from the road to the back of Doralee, and below that there is sort of a low swampy area that eventually feeds this pond which is on the Doralee property.

Q Is the Doralee pond on the low or the high part of the property?

A It is on the higher part of the property. It is to the left as you drive down the road, which is a slight grade to the area; then, of course, there is the back part. You rise up somewhat where they have a cluster of bungalows,

and into the left it rises quite significantly up where they have, I believe, the winter residence, and behind that they have a trailer which is about on grade at one end and probably five or six feet above the ground on the other end. So you can see in a 60-foot run there is quite a significant change in grade.

Q Did you observe the nature of the physical structures and equipment facilities at Doralee?

A Yes.

MR. ORSECK: Your Honor, I am cognizant of your Honor's direction with respect to certain things for redirect, but the question is meaningless unless we know when.

THE COURT: Sustained.

Q Over what period of time have you observed the Doralee property and its structures and facilities, sir?

MR. ORSECK: Objection, your Honor.

THE COURT: Overruled.

A I have been aware of the property for ten, twelve years. I appraised the property adjoining it a good ten years ago. I cannot remember the man's name. He moved to Albany. I know people that live there, two or three families, properties moving down towards Waverly Avenue.

Q Have you observed the Doralee property since 1972 to date, sir?

A Yes.

Q Will you describe the structures and facilities?

MR. ORSECK: Objection, your Honor.

THE COURT: Objection sustained.

There is no foundation.

Q What have you observed in respect of the structures and facilities of the Doralee property in that period of time?

MR. ORSECK: Objection.

THE COURT: Overruled.

A I noticed that they have these concrete block pillars. At one time, one near my property was knocked over. Since it has been fixed up. I know they have two trailers up on the high level towards the Cold Spring Road area.

I noticed a blacktop drive. I don't know how long it has been blacktop. I don't know whether it becomes shale or not. I didn't observe that too carefully. Of recent date the ground is covered with snow.

Q Have you observed any physical structures on the premises?

A Yes. There is a cluster of bungalows. As you come in there are several duplexes and two trailers on your right, and on the right again is sort of a casino social hall building, and the row hits a point where it goes downgrade

to two or three units which would then be on your left.

To the right it is a wooded area, and then you go up a slight grade. There are five or six duplex bungalows on one side and five or six on the other.

Then you come to an area where there is sort of a tool house which is ten by twelve. A doorway has been knocked out. It has not been repaired.

MR. ORSECK: That's the thing, your Honor.

THE COURT: Strike it out.

Have you been on the property to make this observation?

THE WITNESS: Yes.

THE COURT: When did you go on the property?

THE WITNESS: I was on the property yesterday. I drove by and I made some observations. I was on the property last Friday. I made some observations. I have been on the property other times over the years.

THE COURT: You say you went on the property. What were you doing on the property?

MR. ORSECK: That's what I would like to know.

THE COURT: There is a question pending. What were you doing on the property?

THE WITNESS: I went on the property to observe, to see what type of property we were in discussion with.

THE COURT: Did you go into any of the buildings?

THE WITNESS: No, sir, I did not.

Q Did you get out of your car?

A On one occasion I did.

MR. ORSECK: I want to know if he was upon the premises. That's what I want to know.

THE COURT: You have to lay a foundation here as to what opportunity this man has to testify as to the buildings. I gather you are going to get to that.

MR. COLIN: I will, your Honor.

Q Mr. Reiber, did you, over this past weekend, receive a request to inspect certain bungalow colonies previously referred to in this case, and particularly the colonies known as Woodlawn Colony, Annawanna Colony, Landsman Bungalow Colony, Castleview Colony, and East Pond Cottages?

A I was given the names of those various units and I did visit most of them.

Q You were asked to do that, were you?

A Yes.

Q Did you find that because of circumstances that you could not control over the weekend you didn't view all of them?

MR. ORSECK: Your Honor, whatever the reason is, if he didn't view them he didn't view them.

MR. COLIN: I think it is clear there was bad weather over the weekend.

MR. ORSECK: If he didn't view them he didn't view them and he can't testify about them.

MR. COLIN: He is not going to testify as to what he didn't view.

THE COURT: Proceed.

Q Did you see the Lansman's bungalow?

A Yes.

Q Where is that, sir?

A I can't recall the name of the road. It is a town or county road. The bungalow colony is located approximately one quarter of a mile off Route 52, about two, two and a half miles outside ofWoodbourne in the direction going fromWoodbourneto Liberty. At that point you make a left-hand turn and the colony then is on both sides of the road.

Q How large is the land area of the Lansman's bungalow colony?

A 105 acres.

Q How large is it in terms of rental units?

A 101 units.

Q How many rental units does Doralee have, bungalow rental units?

A They have the duplex units --

Q Did you hear testimony today as to the number of units the Doralee has, sir?

MR. ORSECK: Your Honor, that's not the same --

THE COURT: Sustained. Either he knows or you are prepared to accept the other testimony. Whether or not he heard somebody say something --

MR. COLIN: Factually I don't think there is any question.

THE COURT: Then why ask him the question?

Q Is the Lansman's bungalow colony different in size of unit numbers from the Doralee property?

A About four times.

Q Larger or smaller?

A Larger.

Q Is it different in land area from the Doralee area?

A About four times.

Q Did you take some photos of the Lansman's bungalow colony?

A I did.

Q When did you take them?

A I took some Saturday.

Q Of last week?

A Yes, and I took some Polaroid shots yesterday.

MR. COLIN: I ask that these five photos be marked as Defendant Exhibits GG-1, 2, 3, 4, and 5 for identification.

(Defendants' Exhibits GG-1, 2, 3, 4,and 5 marked for identification.)

xxx

MR. ORSECK: If these are offered it is on the consent of plaintiff. We have no objection.

MR. COLIN: Thank you.

(Defendant Exhibits GG-1 through and including 5 received in evidence.)

xxx

Q Mr. Rieber, do these photos fairly represent what you saw as you stood in the camera position?

A Yes.

Q I show you GG-1 in evidence and I ask you to tell me what that depicts.

MR. ORSECK: Your Honor, it seems to me if they are in evidence they all show Lansman's bungalows and for him --

THE COURT: Overruled.

A This is taken about opposite a little A-frame building which appears to be like a crafts building; it is looking towards the pool. You see a fence there. Most of the place is fenced with a chain-link fence, four or three

feet. It is looking down the road to the left towards the playhouse.

Q Is that the road on which the Lansman's bungalow colony fronts?

A That's right, with the back to 52.

Q What is the nature of the development along that highway, sir?

MR. ORSECK: Your Honor, unless we take it step by step I would object to the question.

THE COURT: I will overrule this.

A It is a rural, wooded, rolling area. There are no commercial-type activities of any sort there.

MR. COLIN: With your Honor's permission I will hand these to the jury.

THE COURT: Yes.

(Pause.)

Q I show you GG-2, sir, and ask you what that represents.

A That's taken from the same position as the other, just turning to the right, and it is focusing on the units. There are two-story units there. If you look carefully to the left in the photo you can see a baseball backstop, and it appears to be quite a nice baseball field there. That area is also fenced and it has some wooded background.

Q I show you GG-3, sir, and I ask you what that represents.

A That's a photograph of the main building there at the Lansman's colony, which is obvious from the picture -- it says "Main House" -- where they have their social activities and their entertainment.

Q I show you GG-4, sir, and ask you what that represents.

A That is a view of some of the typical units. They are red and white. They are shrubbed in front. They have trees around them. They are in very good repair and quite pleasant.

Q I show you GG-5 and ask you to tell us what that represents.

A That's a photograph showing the high fences which are around the tennis courts. I believe there are four.

To the right in the photo you will see the back, the standard, or whatever you call it, of the paddleball and handball courts, and near that there is a basketball court.

Incidentally, it is hard to see, or maybe it is not on the picture, but it is lighted so there is some night activity.

Q Are there any tennis courts on the Doralee property?

A No.

Q Mr. Rieber, comparing the Doralee bungalow colony with the Lansman bungalow colony, would you tell me whether in your opinion the Doralee colony is the equal of the Lansman colony?

A Absolutely not.

Q In what way do you rate it? Above or below it.

A The Lansman colony is, to use, an automobile term, like the Cadillac of the bungalow colony industry. It has a day camp and the various facilities we have discussed. The grounds and care of the buildings are far superior than many many bungalows throughout the county.

Q Comparing it with Doralee, what would you say in that regard?

A It is far, far superior.

Q Are there any public golf courses near the Doralee property?

A Yes. There is the Loch Moore and the Terry Brae, which is located in the Morningside Park area in the Town of Fallsburg.

Q Are you describing the Doralee property now or the Lansman property?

A I thought you said near the

Q No. I think you misheard me.

MR. COLIN: May I ask that the answer and

question be stricken, your Honor?

THE COURT: If the witness misunderstood you it may be.

Q My question, sir, was whether near Doralee there is a municipal golf course.

A No.

Q Is there one or more municipal golf courses near the Lansman property?

A Yes.

Q Where are they?

A Terr Brae and Loch Moore in the Loch Sheldrake area, which is quite near this particular colony.

Q Are those public courses?

A Yes.

Q And they are available to occupants of the Lansman colony, are they not?

A Yes.

Q Do you not consider that to be an important attribute for any colony that is near it?

A I think it is of particular importance.

Q Are there any other public recreational facilities in the vicinity of the Lansman bungalow colony?

A Well, you have not really the recreational, but the college is near there. The community college is

near there. There is Morningside Park there, and that park has trailer camps and horseback and various other activities that is sponsored by the town.

Q Is there anything comparable in the vicinity of Doralee to the Morningside Park?

A No.

Q Do you consider the availability of the park facility to the Lansman colony to be important in distinguishing the Lansman colony from the Doralee colony?

A Definitely.

Q Did you inspect the East Pond bungalow colony, Mr. Rieber?

A Yes.

Q When did you do that, sir?

A I was there Saturday and yesterday.

Q When you say "Saturday," you mean Saturday of last week?

A Yes.

Q On what roads or highways is that colony situated?

A It is just off Route 42, which is the road that passes through Kiamesha , which is, of course, where the Concord Hotel is, and you pass through the hamlet of South Fallsburg, and the Neversink River travels on the

right parallel to the road, and as you come to the cross-roads there is a fairly decent restaurant there. You turn right and go over the bridge where in the summertime the students gather to be at the falls, which is called Old Falls there, and then there is a very nice elementary school to the right, ranch-type low one-story-type thing, and some very nice residential properties, and this is now leading to the village where they have a park there, Silver Lake, and they have modern municipal buildings.

As you start to go up the hill and make the turn, you go off to the left and this East Pond unit is situated on about fifteen acres. It is quite pleasant.

Q Is there industrial development on the approach to East Pond?

A No.

Q How near is the Neversink River to the East Pond property?

A Three-eighths of a mile.

Q Is that a scenic river?

A Yes. It is used to some extent as a fishing-type stream.

Q What town did you say this is near, sir?

A It is in Old Falls, which is about two miles out of the hamlet of South Fallsburg.

Q Is the East Pond also near the golf courses and the park you referred to when you described Lansman's?

A Well, it is about three miles or more.

Q Did you take photos of the East Pond property?

A Yes. I believe two.

MR. COLIN: I will ask that they be marked.

MR. ORSECK: May they be marked in evidence?

MR. GRUBBS: I have no objection, your Honor.

THE COURT: They will be received.

(Defendants' Exhibits HH-1 and 2 received in evidence.)

xxx

Q I show you Exhibit HH-1, Mr. Rieber, and ask you what that shows.

A That's a picture of the social hall which is quite large. I can only get half of it in the photograph. It also shows the sign which announces the fact that they have day camp facilities and various sports activities, and the fact that they have Broadway shows as part of their fun and frolic program.

Q How many units are there in the East Pond colony?

A I believe it is 47. There are two winter homes.

Q Is that larger or smaller than the Doralee?

A It is almost twice the size.

THE COURT: This is on half the land?

THE WITNESS: Two-thirds of the land.

Q I show you Exhibit HH-2 and ask what this depicts, sir.

A This is just a view from that same point of some of the bungalow units that are on the premises which have a little wooded background, and they are in fairly good repair and very pleasant.

Q Did you go to the Woodlawn bungalow colony, sir?

MR. ORSECK: Your Honor, I object unless we know which one. There are two Woodlawn bungalow colonies.

MR. COLIN: I don't think so.

MR. ORSECK: Don't argue with me.

E22 THE COURT: If there are two, let us establish where he went so we know where he went.

MR. COLIN: My notes are clear, your Honor, and --

THE COURT: All you have to do is ask the witness where it is located.

MR. COLIN: My objection is to the fact that Mr. Orseck has testified to something that is not in this record.

THE COURT: He has not testified to anything. All he wants to do is make sure that we are talking about the particular place. Can't that be established through the witness?

MR. COLIN: I can do that.

THE COURT: Do it.

Q Did you go to a Woodlawn bungalow colony?

A I did.

Q Where is it?

A The one I visited is on Firehouse Road in Woodbourne and on Route 52, which goes from Woodbourne to Ellenville.

Q Do you know of any other bungalow colony called Woodlawn Bungalow Colony?

A No, sir, I do not.

Q Would you describe the roads or streets on which that bungalow colony was located?

A Well, you have two choices. As you leave the village, the hamlet, of Woodburn you cross the Neversink River. At that point Route 42 goes left and you take Route 52 which goes past the bank there and there is some shopping activity. A little further out you have a very fine fire house in Woodbourne, and there is a road that goes off on an angle and then that straightens. There is very nice

residential area up on the side hill. I think it is ıled Michigan Road.

You can go to the bungalow colony either by going straight on Route 52 or on this Firehouse Road, which is a fairly pleasant drive. It is residences, and one other bungalow colony on that road. Some areas are wooded.

Q Is there any industrial development along the road?

A No.

Q How many units are there in the Woodlawn Bungalow Colony?

A I believe 68.

Q Is that larger or smaller than the Doralee?

A It is larger.

Q To what extent?

A Two and a half times as large.

Q How many acres does it have?

A Forty, I believe.

Q Is that larger or smaller than the Doralee?

A Yes.

Q Is it larger or smaller?

A Larger.

Q Does it have a swimming pool?

A I believe two.

Q Does it have tennis courts?

A Four.

Q Did you take photos of the Woodlawn Bungalow Colony?

A I did.

MR. ORSECK: We would consent that they be received in evidence.

Your Honor, there are two and this is the right one.

(Defendants' Exhibits II-1, 2, and 3 received in evidence.)

Q I omitted to ask you the question about the East Pond property which I will ask you now. I am directing your attention back to the East Pond property.

Mr. Bieber, comparing the East Pond Bungalow Colony with the Doralee Bungalow Colony, would you say that they were equal in comparability or that there was a difference?

A There is a difference.

Q What is the difference?

A The East Pond is a superior colony.

Q Describe that superiority, please.

MR. ORSECK: Your Honor, I certainly don't object to the subject matter because it is relevant but not

in that form.

THE COURT: Let's see what the answer is.

MR. ORSECK: I will withdraw the objection.

A The entertainment that they offer -- and they have day camp -- they have Broadway shows that they feature. The recreational facility in the main building is much larger. Of course the environment, that, in itself, is superior.

Q Is there anything else you want to say?

A The whole approach in getting there is much more desirable. It lends itself to what it is there for, recreational activity. It is certainly more encouraging.

Q Getting back to the Woodlawn colony, sir, I show you II-1 and ask you what that depicts.

A That's taken from Fire House Road. The road on the right is Route 52, and it shows the sign which advertises teen-age camp, and announces the name of the colony with a local number and a New York City number.

Q Now I will show you II-2, Mr. Rieber, and ask you what that depicts, sir.

A That is a view taken from almost the same point back over the grounds showing some of the units and it shows that the land is sprinkled with some trees and it is fairly level.

Q I show you II-3, and ask what that depicts, sir.

That's taken from Fire House Road and shows some of the units, the rear of the units, that face on the road, and the whole complex is sort of clustered together, and there is a large building that can be seen over one of the units just about to the middle of the picture. Most of the fun and frolic, basketball, handball, tennis, paddleball, nd whatnot, is to the rear of the property where the two pools are.

Q Mr. Rieber, comparing the Woodlawn Colony with the Doralea Colony would you say they are equal or different?

A Well, I would say this Woodlawn is a far superior colony in the type of activity, the location, the environment, the entertainment, which includes movies on Sundays, and Thursdays and Sundays, and a band and a show on Friday and Saturday.

Q How about the athletic facilities? Is there a difference there?

A Far superior.

Q What is the difference?

A Well, they have a camp there with three camp buildings and, of course, they have the basketball, and I think they have three paddleball courts and then, of course, as I mentioned, two pools.

Q How many pools has Doralee?

A One.

Q Do they have tennis at Woodlawn?

A Four tennis courts.

Q Has Doralee tennis?

A No.

Q Those are the three colonies that you were able to view between Saturday and Monday, is that correct, sir?

A Yes.

Q You were not able to view the other two, is that correct?

A You mentioned a Castle View Colony. There was some confusion as to Castle View or whether it was Castle Country Club in my mind.

Q Did you see or do you know one or the other?

A I could not locate a Castle View Bungalow Colony which in the phone book is listed as being in Parksville and the number doesn't answer; the post office didn't know where it was.

Q You didn't see two of them?

MR. ORSECK: It has been said three times, Judge.

Q Is that right?

THE COURT: You didn't go to two of them; is that right?

A That's correct.

Q Mr. Rieber, I show you Defendants' Exhibit D for identification and I ask you whether you can identify what is depicted on that photo and where it is located.

MR. ORSECK: I object on the ground that these pictures are already in evidence.

MR. COLIN: Not so far as I know.

THE COURT: It does not seem to be marked.

(Pause.)

MR. ORSECK: Your Honor, the objection --

THE COURT: They are not offered yet.

Q I again show you Defendants' Exhibit D for identification. I ask you, sir, whether you can identify what is depicted on that photo.

MR. ORSECK: That's not a proper question, your Honor.

THE COURT: I will sustain that as to form.

Q Have you ever before seen what is depicted on that photo, Mr. Rieber?

MR. ORSECK: Same objection.

THE COURT: Overruled.

A That property was once owned by a man by the

name of Edward Tompkins. I have been on the property. It is now in worse condition than shown in this picture.

THE COURT: Strike that answer.

Where is it located?

THE WITNESS: The location is almost opposite the road that goes back into the Pargas plant and approximately 350 to 400 feet from the MGO property and lying between the MGO property and the Doralee bungalow property.

Q Is that on the road approaching the Doralee property?

A It is on the left and backs up on the brook that feeds the pond.

MR. COLIN: I offer it in evidence.

MR. ORSECK: So long as it is admitted for what Mr. Colin and everybody else knows it is admitted for, I have no objection. It was taken in 1972 and if it is offered to show what it looked like in 1972, when it was taken, I have no objection.

MR. COLIN: I offer it for what was shown in 1972 when it was taken.

THE COURT: It will be received on that basis.

MR. COLIN: Then I will inquire as to any subsequent conditions.

MR. ORSECK: We will concede that it is in worse

condition, as the witness has volunteered, so let's go ahead.

xxx (Defendants' Exhibit D received in evidence.)

Q I show you Defendants' Exhibit K for identification and ask you whether you have before seen what is depicted on that photo.

A With a slight change.

Q Have you seen what is depicted there?

A In part. It has changed since this picture was taken.

Q I am asking you whether you saw the condition in 1972.

A I have been on that property, that particular property, and I know exactly where this picture was taken.

MR. COLIN: I offer it in evidence.

MR. ORSECK: Your Honor, may I have a voir dire?

THE COURT: Yes.

VOIR DIRE EXAMINATION

xxx BY MR. ORSECK:

Q Since 1972 has whatever is shown on this picture been there in the same manner as --

A The pump is gone.

MR. COLIN: That's not a voir dire going to

admissibility.

MR. ORSECK: He said that the pump is gone. What is the difference if I ask it now or later?

No objection with that understanding.

xx (Defendants' Exhibit K received in evidence.)

BY MR. COLIN:

Q Is the oil tank still there?

A Yes.

Q Will you tell me the location of the pump and tank which is depicted on the last exhibit that you looked at?

A It is located on the Town Barn property, on the right side of Cold Spring Road, almost opposite the Doralee property, on the Village side ofthe pond.

MR. COLIN: I ask that there be marked for identification these three photos.

(Defendants' Exhibits JJ, KK, and LL marked

xxx for identification.)

MR. ORSECK: May we approach the bench, your Honor? We have three documents that have been marked for identification.

THE COURT: Yes.

(At the side bar.)

THE COURT: What is the purpose of LL?

MR. COLIN: LL is a representation of the Doralee property on the margin of the lake, the conditions.

MR. ORSECK: April of 1972. How can that help us in the case?

THE COURT: How does this affect your case at all? What does this do?

MR. COLIN: I think this relates to the claim that this property was comparable to other properties.

It relates entirely to the plaintiff's claim that they had an impairment of rental capability.

MR. ORSECK: We are talking about that one picture now.

THE COURT: What about this one, KK?

MR. COLIN: That's a photo of the Pargas plant. It was on the approach. It shows the nature of the development in the area of the plaintiff's property, the conditions in that area.

THE COURT: But it is way down in the back. This is not on the road.

MR. ORSECK: That's Pargas's back yard.

THE COURT: Isn't the same true of JJ? That's a car that is in somebody's back yard off the road.

MR. COLIN: I think these are both on roads on which this property is approached, your Honor.

THE COURT: This is a dirt road.

MR. COLIN: I don't know of my own knowledge. I think we would have -- we can ascertain that from the witness.

THE COURT: I will not let you throw in the fact that somebody left a junky car there in 1972 obviously 75 or 100 feet off the road in his back yard. You can find that on a country road leading to any of these other places.

MR. COLIN: This is part of the environment.

THE COURT: I don't think so. This is not something that should be considered here as part of the environment.

Are you offering LL for identification simply because it has a can lying in it?

MR. COLIN: I offer it because it is a picture of the plaintiff's property taken in 1972. I did not take it, but it is an environmental representation.

THE COURT: Taken in April.

MR. ORSECK: I will consent to this one.

THE COURT: LL will be received.

You have to establish through this witness that this is something that one driving along the road would see.

MR. COLIN: Your Honor is excluding --

THE COURT: At this point I am sustaining an objection.

MR. COLIN: I am referring to JJ.

THE COURT: That's the same thing. I suppose JJ also. I think JJ should be excluded as a matter of discretion.

(In open court.)

MR. COLIN: I will limit my inquiry to the two you suggested.

THE COURT: One is already in evidence.

BY MR. COLIN:

Q Mr. Rieber, I show you the photo that has been marked for identification as KK. I ask you what is the location of what is depicted on the photo.

A That's taken almost in front of the other picture we identified earlier in testimony, the former Tompkins property, and it is looking down a road called Schroeder Road. At the end of that road is an abandoned plant, and there is Pargas plant to your right. I believe in that same area you will find the Wechsler Chlorine Pool Supply.

Q Where in relation to the Doralee premises are the premises depicted on Exhibit KK?

MR. ORSECK: Your Honor, I object. I think

the only appropriate question is where is Cold Spring Road?

THE COURT: That objection is well taken.

Q What road or highway is that facility on that is depicted --

A Schroeder Road, which comes off Cold Spring Road, and at that point it is approximately 400 feet from the MGO property and between the MGO property and the Doralee property.

Q How far distant is it from the Doralee property?

A The point to where the picture is taken is some 700 feet.

MR. COLIN: I will offer it in evidence.

THE COURT: Do you want to ask a question or two?

MR. ORSECK: Yes.

VOIR DIRE EXAMINATION

xxx BY MR. ORSECK:

Q It is true, is it not, Mr. Rieber, that anybody going to the Doralee Bungalow Colony would use Cold Spring Road, or if that is not the case 99 percent of the time, true?

MR. COLIN: Objected to.

A Either that or Waverly Avenue.

Q My question is, you know they are summer people.

A All bungalow colonies in Sullivan County are

rented to summer people from New York.

Q Instead of sparring with me --

MR. COLIN: I object to that.

THE COURT: Let's focus on what we discussed at the side bar.

When you look at this picture, Mr. Rieber, where is Cold Spring Road?

THE WITNESS: It is right here (indicating).

THE COURT: It is where the photographer is standing?

THE WITNESS: Yes. This would be Schroeder Road, and the coal yard is not in view.

THE COURT: This is what you would see if you were on Cold Spring Road looking towards Pargas?

THE WITNESS: Which would probably be like facing west. I am not sure whether it is west or north.

THE COURT: I will overrule the objection.

xxx (Defendants' Exhibit KK received in evidence.)

(Recess.)

(Jury in box.)

THE COURT: Please proceed, Mr. Colin.

BY MR. COLIN:

Q Mr. Rieber, I show you again, sir, Exhibit LL. I ask you what property is depicted on that exhibit.

A That picture depicts the lake at the Doralee bungalow colony, the dock on the lake, and in a distance the social hall, and I believe that this is not too clear, but near one of the bungalows is a trailer in the upper middle.

MR. ORSECK: That was consented to, your Honor.

MR. COLIN: But it was not identified as to where it is.

MR. ORSECK: You are right.

Q I show you F for identification, Mr. Rieber. What is represented?

A That's a firm I mentioned earlier, Wechsler Contracting, that sells swimming pool equipment, chlorinating equipment, pumps for those purposes, and the property I mentioned is Schroeder property that was sold recently for $12,000.

THE COURT: Just answer what you are asked, please.

Q Where is the property located that is shown there?

A It is taken almost at the exact spot as the picture that depicted the Pargas on Cold Spring Road and Schroeder Road.

MR. COLIN: I will offer it in evidence.

MR. ORSECK: I consent.

xxx (Defendants' Exhibit F received in evidence.)

MR. COLIN: I have nothing further to ask of Mr. Rieber.

CROSS-EXAMINATION

xxx BY MR. ORSECK:

Q Since both of us are from Sullivan County we know each other a little bit, true?

A Yes.

Q For a minute let us talk about the East Pond bungalows. I am sure it was inadvertent that you omitted to mention to the jury that it virtually abounds an abandoned hotel formerly known as the El Dorado.

MR. COLIN: I object to that.

THE COURT: On what ground?

MR. COLIN: The form of the question is just utterly improper.

THE COURT: Try again.

Q Do you know the old El Dorado Hotel?

A I believe the El Dorado became the Palm Springs, or something of that nature, or the Palm Country Club.

Q And it is abandoned, is it not?

A There is a For Sale sign on it.

Q Is it abandoned?

MR. COLIN: Objected to, your Honor.

THE COURT: Overruled.

MR. COLIN: Abandoned --

THE COURT: He testified to abandoned houses on direct examination, so I assume he knows what the word means.

THE WITNESS: It is not an operating hotel.

Q Have there been fires there in the last two or three years?

A I don't know of any to my knowledge.

Q Has there been vandalism there in the last two or three years?

A Not to my knowledge.

Q As a matter of fact, from the highway, from Woodridge Hole going up from Old Falls you can see part of the front of the building that has fallen off; isn't that so?

A I don't know.

Q You do know that for a good number of years the El Dorado Hotel, which virtually abounds East Pond cottages, has not been in use? That you know?

A I know there is a bungalow colony next to East Pond. Whether the two properties abound, I do not know.

Q I am talking about the abandoned non-use state

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of the former El Dorado Hotel.

MR. COLIN: I object to that.

THE COURT: Overruled.

A I don't understand the question.

MR. COLIN: It's not a question.

Q Do you know it to be a fact that the hotel that I am discussing, the El Dorado, later known as the --

A Palms Country Club.

Q That has not been in use for at least three or four years?

MR. COLIN: I object to that as repetitious. It has already been asked and answered, your Honor.

THE COURT: Overruled.

A I believe about three years. I'm not too sure.

Q Down at the foot of the hotel there is a big gas station and a body shop called Cantrowitz'; true?

A It is a body shop.

Q You forgot about that?

A He does very fine work and he is very well regarded.

Q As a matter of fact, he is a half-baked relative of mine, but you omitted to tell us about that commercial facility in the vicinity. As a matter of

fact, that's a Citco station, isn't it?

A I don't know.

MR. COLIN: That is objected to.

MR. ORSECK: They talked about a Texaco station a mile away.

THE COURT: Let's proceed.

Q Let's go further up the hill towards Woodridge. There is a poultry farm up there, is there not? Isn't there a poultry farm right up by the bend before you get to the Olympic Hotel?

A Not to my knowledge. I know Eliot Tructor and Tructor had a sign to the right up there, and there's a couple of homes to the left as you get to the crest of the hill, but I don't know of any chicken farm.

Q You have been in Sullivan County fifteen years?

A Yes.

Q Would you tell the Court and jury whether or not it is common to see in Sullivan County, especially outside of the incorporated village, abandoned vehicles?

A There are some on occasion.

Q Let's talk about Doralee for just a minute. You know, do you not, that she has 400 feet, common footage, with Colonial Hill apartments, do you not?

A I have a map here. I don't know if it is 400 feet. It is more or less. But I know it bounds at the point where the high tension line crosses the property.

Q Tell the Court and jury -- and you know properties in Sullivan County -- whether or not, as far as apartments are concerned, there are any nicer apartments in our county than Colonial Hill?

MR. COLIN: I object to that.

THE COURT: Overruled.

Q Are there nicer apartments?

MR. COLIN: May we approach the bench on this?

A I don't know as to that, if there are any nicer. They are of a fairly decent quality, that's true.

Q That's not exactly my question.

Do you know of any better ones in our county?

A There is a very fine apartment complex next to -- Windward. I think that is a very fine one.

Q How about Colonial? Don't you think they are about the best?

MR. COLIN: I object to that.

A The contiguous situation --

THE COURT: Overruled.

You are being asked whether an apartment complex on one side of Doralee is not the finest apartment complex

in the county.

THE WITNESS: There is one objection I have to that unit.

THE COURT: What is your answer to the question?

THE WITNESS: They are of quality.

(Record read.)

THE WITNESS: I'm not sure if theirs is the best.

Q Which ones are better?

MR. COLIN: I object to that.

THE COURT: Overruled.

A I think the Windward is good, if not better.

Q Let me make it better for you. Is it among the three best apartment house complexes in Sullivan County?

A I never did that broad a study on apartment houses as to quality.

Q You took the trouble to take pictures of these other bungalow colonies, right?

A Yes.

Q East Pond and others?

A Yes.

Q Did you take any of the Doralee bungalows?

A No.

Q At Lansman's, did you ascertain that Lansman's

bungalow colony is in effect in two parts, the old bungalows and the new ones?

A There are some units which appear to be a little more modern than the others, but all of them are in very fine condition.

Q My question is this: Did you determine at Lansman's that there is a section of thirty older ones and a section of something like seventy new ones?

MR. COLIN: Objected to.

THE COURT: Overruled.

A No.

Q Do you know if the Doralee bungalow colony has movies on Saturday nights and shows too?

A No, I do not.

MR. COLIN: That is objected to.

THE COURT: Overruled.

Q I think you must know, being up there that long, that the shows, whatever they are, come up in the summer and go from place to place and spend the summer up our way?

MR. COLIN: Objected to.

THE COURT: What is the basis for that?

MR. COLIN: I think there has been nothing to support the question being asked.

THE COURT: The traveling shows? He is asking him if he knows about the traveling shows.

What is the reason for the objection?

MR. COLIN: I think there is a lack of basis for the question.

THE COURT: That he doesn't know?

MR. COLIN: There is nothing to support the assumption contained in the question. It assumes circumstances not in evidence.

THE COURT: That objection is overruled.

Q You can answer.

A I know that the entertainers move on different nights to different hotels and bungalow colonies to pursue their professional work.

#23 Q As a matter of fact, does LL show a playhouse?

A That's a social hall, the playhouse, yes.

Q It has a sign on it too?

A I did not observe the sign.

Q I am asking you about the picture which you said was a fair representation.

A I don't see a sign.

Q Is Doralee the closest of all of these bungalow colonies that you have spoken about to the Monticello Racetrack?

A As to East Pond, Woodlawn, and Lansman's?

Q Right.

A It is closer than any of those three.

Q Did you ever hear of Dahoya Park?

A Yes.

Q Is that about two miles or three miles from her colony?

A About two miles.

Q The Cooks School, aren't there public tennis courts and a running track? And last summer wasn't there a round-the-clock softball game that set a world's record, three days in a row, and people were playing softball without quitting?

MR. COLIN: I object to that.

THE COURT: On what ground?

MR. COLIN: On the ground that the question contains facts not in evidence and would be immaterial, in any event, whether there was a world's record or not.

THE COURT: This has to do with facilities available to residents. You asked questions about golf courses.

MR. GRUBBS: I object to the question on the ground that all of those things would have to be assumed, and there is no evidence to base such a question on.

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MR. ORSECK: I asked if he knew about it.

THE COURT: He was asked if he knew about the golf courses.

Overruled.

Q How about it, Mr. Rieber? Do you have an answer to that last question?

A What is the question, please?

THE COURT: Put the question again.

(Record read.)

MR. GRUBBS: I object to the form of the question.

THE COURT: Overruled.

A (Cont'g) As to the ballfield, I will say yes, I know there is those facilities. Whether there was a record made, I'm not too sure.

Does that answer your question?

Q The important thing, the facilities are there, right? The running track, the Dahoya Park, and the Cooks School?

A The school is in the village and Dahoya is a village facility.

Q When you came down Cold Spring Road, I think you forgot to tell us about the building that the doctors just put up within the last two years, right?

A On the lot that Koback had donated to the Community Center? Yes.

Q You forgot about that?

A I started the commerce at Clement's garage.

Q That's a nice building and a big investment, is it not?

A It is a very nice building.

Q The VFW, that's a pretty nice building, is it not? There is nothing wrong with it, is there?

A I appraised that once. I would not say it is such a nice building.

Q And the Episcopal Church is back there too?

MR. COLIN: Back where?

MR. ORSECK: Back towards Broadway. He talked about the old school.

A The Mills School is on St. Johns Street, on the right-hand side, and directly opposite that is St. John's Church.

Q So that the jury understands, St. Johns Street and Cold Spring Road, they are both an extension of one and the same road, are they not?

A It comes to be known as Cold Spring when you pass the brook.

Q How about the Colonial Hill residential area:

pretty nice houses there?

A I would say about fifteen.

Q What are they like?

A It ranges in excess of $40,000.

Q Nice houses?

A Yes.

Q Down the road further there is the Melody Lake development, isn't there?

A Some four miles.

Q Down the road and turning left towards 17 you have the Filkof bungalow colony?

A Yes.

Q As far as restaurants in Sullivan County, do you agree that the bulk of them, the better ones, are centered in the Monticello area?

A No.

Q It is not fair to say that?

A No.

Q The bulk of them are centered --

A You are talking about the finer restaurants?

Q Yes.

A You are asking my opinion. I gave it to you.

Q Forget about your opinion. How about the general public acceptance of restaurants?

MR. GRUBBS: Objection.

THE COURT: I will sustain an objection to that.

Q Are there restaurants, higher-priced restaurants, and more of them, closer to Doralee than there are to these other places you have discussed?

MR. GRUBBS: Objection. There is no basis that this gentleman knows anything about it.

MR. ORSECK: He knows.

THE COURT: Overruled.

Let us see if he knows.

A If I choose to go out and eat I would not use any of the restaurants in the heart of the village.

Q Which would you go to? Would you go to the Homestead?

A Yes.

Q Guarney's?

A No.

Q How about the western part of the county?

A The Preserve.

Q Isn't Doralee closer to all of those than the other places?

A Yes.

Q I want to ask you a question. Bungalow people

cook their own, right? They have a kitchen and their own little dining table, right? Isn't that the nature of the bungalow business in Sullivan County?

A Yes.

Q Tell the jury whether or not it is a fact that food shopping facilities are more accessible to Doralee than any of the other bungalow colonies you have mentioned?

A You are talking about leaving the colony and going --

Q However you think my question was framed and whatever you think the answer is. There is nothing complicated about it.

A I believe the answer would be yes.

Q One last question: I ask you to assume that a quantity of oil was dumped into a lake in Sullivan County or any other place. Would you tell the Court and jury whether or not that would enhance or diminish the value of that lake?

MR. GRUBBS: Objection.

MR. COLIN: I object to that.

THE COURT: Come to the side bar.

(At the side bar.)

MR. GOSECK: He is qualified.

THE COURT: What is the matter with that question?

MR. COLIN: There is nothing in evidence in this case that supports such a hypothetical question. There is nothing that shows a quantity of oil was dumped into a lake.

THE COURT: Rephrase it that the oil found its way into the lake.

(In open court.)

Q I will reframe the question.

Do you have an opinion as to whether or not the presence of oil in a lake and in a lake bottom would add to or diminish the value of the lake and the immediate surrounding property?

MR. GRUBBS: Objection.

MR. COLIN: Objection.

THE COURT: Overruled.

(Pause.)

A You are talking about oil floating on top of the water or on the bottom?

Q Both.

A It may affect its value in the area of the cost to cure.

Q It may or would?

MR. COLIN: Objection.

THE COURT: Overruled.

A May.

MR. ORSECK: No further questions.

CROSS-EXAMINATION

xxx BY MR. GRUBBS:

Q The Colonial housing area was mentioned to you. You mentioned something about a large bluff. Could you tell us what the relative elevation is with respect to the vicinity of Doralee and where this housing area is located?

A I have a map which shows some topography in my notes. I think it is some 50 to 60 feet. If that's an adequate answer I will stand by that.

In the back it looks like 58. This comes almost to the rear line, and near the lake it is 1500 -- about 58 feet.

Q Is any of this marsh or swamp land located up where the Colonial housing units are located?

A Marsh there? No.

Q In other words, it would be fair to say that the Colonial housing units are up on the cliff and Doralee is down near the swamp or marsh lands?

A Yes.

Q I believe you mentioned something about the area of Waverly as you approach the Doralee Estates. You mentioned that there was a village fill area near the

Doralee Estates property.

A Yes.

Q Would you be good enough to tell us what is a village fill area?

A That's where they put their garbage, refuse, and trash.

Q How long has such an area as that been located close to the Doralee Estates?

A In excess of two years.

MR. ORSECK: Objection.

THE COURT: I sustain the objection. Strike out the answer.

MR. ORSECK: I wish you would establish the distance.

Q Would you be good enough to tell us in yards how far the closest point of the village fill area is to the Doralee Estates?

A I would say 500 yards.

Q Has that village fill area been in operation ever since 1965?

A Oh, yes.

Q Would you tell us what properties are between the village fill area and Doralee Estates along Waverly?

A Along Waverly? When I gave you that distance

it was the approximate distance. My property borders on and corners at the dump. They dumped over the line on me.

Q How far is your property from Doralee Estates?

A Part of it, the frontage, is directly opposite the Waverly Avenue frontage, almost, next to the Rumsey property.

Q Would you say in distance how far is the closest area of your property to the Doralee Estates?

A Well, the properties were contiguous. It may be twenty or thirty feet, but you have to know that rural properties are described to the center of the road. Likewise Doralee and I would be. We don't touch, but we are within twenty feet of each other.

Q The village fill area adjoins your property?

A Yes.

Q Your property is contiguous with the Doralee property?

A Yes.

MR. GRUBBS: I have nothing further.

RECROSS EXAMINATION

BY MR. ORSECK:

Q Your property and Doralee are separated by a street?

A Waverly Avenue.

Q The village land fill runs close to Broadway, does it not?

A The access is closer to Broadway.

Q Where has the fill been deposited in the last five years?

A They have been using various areas.

MR. ORSECK: No further questions.

MR. COLIN: I think he was in the middle of an answer.

MR. ORSECK: He answered it.

THE COURT: He answered it.

REDIRECT EXAMINATION

xxx BY MR. COLIN:

Q Mr. Rieber, if one were standing in the area of the Doralee pond, is the Colonial Hill apartments visible from that point?

A No.

Q Mr. Orseck asked you some questions with respect to several of the properties that you viewed. I am referring to East Pond, Woodlawn, and Lansman's. You gave him certain answers to those questions. I ask you, sir, whether anything that Mr. Orseck asked you, or anything that you responded, had the effect of changing your opinion in respect of the comparison of those properties with the

Doralee property?

MR. ORSECK: Objection.

THE COURT: Something is the matter with the form of that question. I'm not sure what it is, but I sustain the objection.

Q With respect to the comparability of the Doralee property with Woodlawn, East Pond, and Lansman's, is your opinion the same at this time as it was on direct examination or has it changed?

MR. ORSECK: I object, your Honor. We are getting to a jury question on an ultimate issue, and he gave his opinion and it was tested on cross-examination. I do not think that it has any probative value.

THE COURT: I will overrule the objection.

Have you changed your view at all?

THE WITNESS: In my attitude as to these other colonies being superior, no. I have not.

MR. COLIN: No other questions.

RECROSS EXAMINATION

BY MR. ORSECK:

xxx

Q Have rents gone up in Sullivan County, to your knowledge?

MR. COLIN: I object to that.

MR. GRUBBS: What kind of rents?

THE COURT: I will sustain an objection to that. This is not recross.

Will counsel come to the side bar.

(At the side bar.)

THE COURT: Do you have any more witnesses?

MR. COLIN: Yes, sir. I have one more, I believe. I cannot think of any others.

THE COURT: Then you will rest?

MR. COLIN: Yes.

THE COURT: How long is that witness going to be?

MR. COLIN: I would ask that we suspend now so that I can start first thing in the morning.

THE COURT: We are going to do that.

How long will he be?

MR. COLIN: On my side I think not over thirty or forty minutes. That's my best estimate.

THE COURT: Depending on how I rule on your motion to dismiss, Mr. Grubbs, if you went forward how much of a case have you got?

MR. GRUBBS: Not more than one witness, if that.

THE COURT: I have a commitment tomorrow at four o'clock which necessitates my leaving here at 3:20,

3:25 at the latest. We will take whatever witnesses we have got and we will take whatever summations we can get in during the day tomorrow, and then I will resume and charge after. Whatever is left over on Thursday morning --

MR. ORSECK: Your Honor, I might not get another opportunity --

THE COURT: Are you going to have rebuttal?

MR. ORSECK: No.

I would like to say this on the record. In hopes of assisting the Court, with respect to Mr. Grubbs' case, I think that the only issue I would suggest that need be reached by the Court in determining that motion is that there is a claim of negligence against Cities Service. It would seem to me that Cities Service --

THE COURT: This is something for us to argue at a later point.

Ten o'clock in the morning?

MR. COLIN: Yes, sir.

May I ask that if possible we have all summations on the same day?

THE COURT: We will try.

(In open court.)

THE COURT: We are going to be in recess until ten o'clock in the morning. Continue to keep an open mind

and do not discuss it among each other.

See you in the morning.

(At 4:45 p.m. the proceedings were adjourned, to be reconvened at 10:00 o'clock a.m., January 12, 1977.)

- - -

#24

DORALEE ESTATES, INC.,
vs.
CITIES SERVICE OIL CO.,
vs.
MGO CORPORATION

73 Civ. 907

January 12, 1977
10:20 a.m.

(Jury in box.)

THE COURT: You may proceed.

MR. COLIN: Mr. Adler, please.

A L V I N A D L E R, called as a witness by the defendant Cities Service Oil Co., having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

xxx

BY MR. COLIN:

Q Where do you live, sir?

A Woodridge, New York.

Q What county is that?

A Sullivan County.

Q Is that in the vicinity of Monticello?

A Yes.

MR. ORSECK: Monticello is in the vicinity of Sullivan County.

A (Cont'g) Ten miles from Monticello.

Q What is your business or profession?

A I am a civil engineer.

Q Where do you make your office?

A In Woodridge.

Q Have you engaged in any other business or profession besides civil engineering?

A Construction.

Q What engineering school or college are you a graduate of, sir?

A NYU, Bachelor of Civil Engineering, in 1949.

Q Do you hold a certificate from the State of New York in your profession?

A I do.

Q How long have you been engaged in the practice of civil engineering?

A Approximately twenty years.

THE COURT: What is the practice of civil engineering?

THE WITNESS: The construction of buildings, highways sewers, lakes, water supply, dams, bridges.

THE COURT: Do you draw the plans or do you execute others' plans, or what?

THE WITNESS: Both. In my case we draw plans and we would build for others as contractors. I had construction companies that I was principal in.

Q Were you in construction for substantially the same period of time?

A Even longer.

Q Are you familiar with the Doralee bungalow colony and the lake on that colony?

A Yes, I am.

Q Have you ever had any business involvement with the Doralee colony?

A Yes, I did.

Q What was the nature of it, sir?

A We were asked to draw some sewerage disposal fields, septic tanks and leaching ditches about four years ago for the addition of several trailers or units.

Q Did you draw such plans?

A Yes.

Q In the course of your work, did you become familiar with the physical aspects of the Doralee bungalow colony?

A Yes.

Q Have you at my request estimated the size of the lake at Doralee?

A Yes.

Q Tell me, sir, the method by which you did that?

A Well, the first item that I used, I used a map

that Doralee had given me indicating the topography of not only their land but the surrounding land, and I prepared by scaling the size of the lake.

Q What do you mean when you say that you scaled the size of the lake?

A Prepared a graph with a 1000-foot grid and overlaid it on the particular map and by filling in the area determined how large the area was.

Q Is each map made to a certain scale, meaning a certain number of inches or fractions of inches representing a larger dimension? Is that what is meant by scale, sir?

MR. ORSECK: Your Honor --

MR. COLIN: I will withdraw that.

Q What is meant by "scale"? I thought it was a simple underlying question. What is meant by that?

A That's the dimension you use in doing the drawing. One inch on your ruler or scale, we call that the ruler that everybody uses, we call this a scale. One inch on that would represent so many feet on the physical drawing that we have which is related to the physical room or lake or road or what have you.

xxx (Defendants' Exhibit MM marked for identification.)

Q I show you Exhibit MM for identification and ask you whether that is a copy of the scale map that was

furnished to you by Doralee?

A Yes, it was.

Q There are certain marked areas on that map, are there not?

A Yes.

Q What do they represent?

A They represent the two lakes at the property itself, on the Doralee property.

Q There is another rectangular marked area. What does that represent?

A That represents a one-acre parcel drawn to the same scale as the map so that you could see what an acre is in area, and then looking at the lake have an idea what it is.

MR. COLIN: I offer that in evidence.

MR. ORSECK: May I have some voir dire questions, your Honor?

THE COURT: You may.

VOIR DIRE EXAMINATION

xxx BY MR. ORSECK:

Q Mr. Adler, you used the scale of one inch to 200 feet; is that right?

A Yes.

Q You applied the measurement of one inch on that document, did you not?

A Yes.

Q Can you tell this Court and jury whether or not you have any knowledge that by photocopying that map it is thereby reduced, and if that be the case, that one inch indicated on the photocopy would be a lot more than 200 feet?

MR. COLIN: I object to the form of the question.

THE COURT: Do you understand that question, Mr. Adler?

THE WITNESS: Yes.

THE COURT: Overruled.

THE WITNESS: Reread the question.

MR. ORSECK: I will withdraw the question.

Q Is it a fact that if the map which was offered by Mr. Colin was reduced in reproduction in size and if you used one inch of actual measurement as the scale of 200 feet, the one inch would really represent more than the 200 feet; is that true?

A If? Yes.

Q I ask you whether or not the small map offered by Mr. Colin has been reduced in size from the original which does have a scale of one inch to 200 feet.

A It was not reduced.

Q How do you know?

A Very simply. This map is a topographic map with a five-feet contour interval drawn on a master grid. It was prepared for a larger area of Monticello. In preparing these grids the grid lines which are indicated on this map, plus my master sheet which I just pulled out, scales out exactly five inches, which is as it should be. If it was a 4-3/4 or 4-7/8, I would know there was a reduction. Therefore I know this is not a reduction on this scale; that it has been reproduced directly.

Q I ask you whether or not you know that the scale shown on that map comes from the map itself; in other words, that it shows a scale superimposed on the exhibit; true?

A Yes.

Q Do you know whether or not that scale was prepared by whoever's name is on it for that map?

A To the best of my knowledge I prepared and superimposed this on the sheet from the original given to me by Doralee, so that's the scale as shown.

Q Do you have the original with you?

A Yes.

Q May I see it?

A Yes (handing).

Q That's a small scale, is it not?

A One inch is 200 feet.

Q That's a small scale, is it not?

A Depending on the type of work you are doing.

Q Tell the jury on a scale of one inch for 200 feet what the effect is of the width of a pencil line?

MR. COLIN: I think we have gone beyond voir dire testing the map. This is now cross-examination, I submit.

THE COURT: I will permit this question. You may proceed.

A If you use a fine pencil I would say that it has a difference of about a foot or two on that scale of this map.

Q Is it a fact that you cannot ascertain a true high water mark of the lake from that document?

MR. COLIN: That is objected to.

THE COURT: I will sustain an objection to that. I will admit the exhibit in evidence. You may cross-examine further.

xxx (Defendants' Exhibit MM received in evidence.)

MR. ORSECK: I would ask it not be exhibited to the jury until after cross-examination because opinions are included therein.

THE COURT: If there is something on there that

is not part of the exhibit that should be excluded.

MR. COLIN: There is nothing on here that will not be covered by the testimony to be given.

THE COURT: What is it you claim should not be on here?

MR. ORSECK: Right here (indicating).

THE COURT: He is going to testify with respect to that, I would suppose.

Ladies and gentlemen, I am admitting this exhibit. There is a figure in there of 1-3/4 acres. At this point that figure is not in evidence. We have had no testimony on that.

MR. COLIN: I have not reached it yet.

THE COURT: I am admitting the exhibit as a map. At this point there is no evidence supporting that figure so to this point that figure is to be disregarded.

You may proceed.

BY MR. COLIN:

Q Mr. Adler, on this Exhibit MM in evidence there is an indication of a lake and an area for that lake. Do you see it, sir?

A Yes.

MR. COLIN: May I have Plaintiff's Exhibit 1, please?

MR. ORSECK: Here it is (handing). We are handing Exhibit 1 and 1-A to Mr. Colin.

Q I hand you Exhibit 1 that was offered in evidence by the plaintiff here and ask you to compare it with the map that has just been admitted in evidence as MM, the map before you.

A Yes.

Q I ask you, sir, does each of them show the Doralee lake?

A Yes.

Q I ask you, sir, whether there is any difference between the two maps insofar as they cover or represent the same area.

A They represent the same area and they are copies of the same map.

Q Going back to Exhibit MM, the one on which you have indicated the lake, I ask you to tell the Court and jury, Mr. Adler, whether you made calculations as to the area of the lake.

A I did.

Q Explain how you made the calculations of the area?

A I set a grid --

Q What is that?

A A system of small squares. I set a grid, a 100-foot grid, and superimposed the size of this lake on the squares.

Q Explain what "superimpose" means.

A By putting the squares -- a system of grids, 100-foot grids, on tissue, laying it over --

Q Is that a transparent?

A It is a transparent tissue, and laying it over this and tracing the lake through on the tissue I covered a certain amount of these squares, and by counting the number of squares --and each square represented ten thousand square feet -- in this case we count the number of squares and we know how much area is covered by the lake.

Q You arrived at an area by that method; is that right?

A Yes.

Q What area did you arrive at?

A One and three-quarter acres.

Q Is that the figure that you wrote on the map for the lake?

A Yes.

Q Does that calculation include the wider body of water shown on the map as part of the lake as well as a narrower neck of water connected to it?

A It included the neck and wider body, the complete lake.

MR. COLIN: May I exhibit this to the jury, your Honor?

THE COURT: You may.

(Pause.)

Q After you made the calculation of the area of the lake, did you make any calculations with respect to the cost of removing soil from the bed of the lake?

A I did.

Q Tell us, please, how you made those calculations and what assumptions or promises were contained in your calculations.

A Well, now that I had the area of the lake I had to determine the depth that I was going to remove. I placed a telephone call to Mr. Sam Levine, a civil engineer in our community --

MR. ORSECK: I would object to this, your Honor.

MR. COLIN: May we approach the bench, your Honor?

THE COURT: Come to the side bar.

(At the side bar.)

MR. COLIN: Your Honor, in connection with the expert testimony offered by Mr. Edison, as was stated, an

expert has to go into the field to assemble data in order to arrive at his final conclusions. In this case I am going to establish Mr. Levine was a senior engineer in this neighborhood operating there for many, many years, familiar with the area, and Mr. Adler consulted with him to ascertain the bottom depth as a predicate for his homework. I think that's perfectly proper. It's in the nature of field work assemblage of data.

MR. ORSECK: That's hearsay. What he can do, he can try to impeach our bill, and the way he can do it is to show different quantities and different prices. We had to be put to the proof and so does he.

THE COURT: If he is going to testify in effect the results here based upon what somebody told him was the job before him, then the other gentleman is the expert and not this witness.

MR. ORSECK: That's right.

MR. COLIN: The other gentleman collapsed about a month ago while testifying. He is not available. I still submit, sir, that an assemblage of such data is proper.

THE COURT: This is not an assemblage of field data.

MR. COLIN: He asked him what the depth of the material in the lake was.

THE COURT: You got that already in the record.

MR. ORSECK: We can only go by the record.

THE COURT: I will sustain that objection.

Why don't you use the figures that Mr. Rosch used?

MR. COLIN: Did Rosch use six inches?

MR. ORSECK: Yes.

(In open court.)

BY MR. COLIN:

Q Mr. Adler, did you make any computations which assumed that the material to be removed had a depth of six inches?

A Yes.

Q Will you give us your answer and the way you arrived at your answer on removing a depth of six inches from this 1-3/4-acre lake?

MR. ORSECK: I object to the form of the question --"from the lake."

THE COURT: I assume it was drained.

MR. COHEN: Yes.

MR. ORSECK: I object to his characterization of what the dimensions of the lake are.

Q From the lake as you estimated its dimensions to be.

MR. ORSECK: That's a different story.

A I examined it from two methods to see how I would remove the bottom of the lake.

The first thing we would have to drain the lake. I know the lake is drainable. By living in a community there had been work done up there and I know it had been drained before.

Then I went through two methods. We would drain the lake, let the soil dry out -- it is sopping wet and there is much on the bottom of all lakes.

Q What does that muck look like?

MR. ORSECK: Objection unless he saw it.

Q How many lakes in the Sullivan County area have you seen in a dry or drained state?

MR. ORSECK: Your Honor, I object. We have a special situation.

THE COURT: I sustain thatobjection. This is a lake that is fed from the swamp which might differ from a lake that is fed from a river.

Q Are you familiar with the feed for this lake, sir?

A Yes.

Q Are you familiar with the neighborhood surrounding the Doralee Lake?

A Yes.

Q On the basis of that familiarity, are you able to tell me the nature of the material that enters the lake?

A Carrying through with the water you would find a black muck basically when you drain the lake.

MR. ORSECK: Your Honor, that was not responsive.

THE COURT: Come to the side bar.

MR. ORSECK: I withdraw the objection. We will save the side-bar conference. I'm sorry.

Q Let's get back to your calculations, Mr. Adler, which were an assumption of a six-inch depth, the lake being drained, and now you are computing the cost of removing the bed of that lake to that depth.

A Right.

I made several assumptions. We drained the lake and I would let it dry so we could get on it, otherwise it is a soft muck and hard to handle. Then I would go in with two -- method one, let's call it. I would go in with a rubber-wheeled machine, a front-end loader, scooping up the material that has been dried and push it over to part of the property that lies opposite the lake and stockpile it, let it dry. Then I would come back at a future date after that drained some more, because I have a feeling it

would still be wet being in the lake that long, and spread it and seed it. Spread the top soil, the muck from the bottom, and spread it and seed it.

Q What kind of seed?

A Grass seed, alfalfa or rye over the top of it. That was one method that I would use.

THE COURT: You would take it completely out of the lake bottom. Where would you carry it to?

THE WITNESS: There is an area alongside of the lake indicated here on the map, a long flat area. That was one method.

Then I calculated --

Q What is the cubic yardage represented by this material, sir? We are assuming six inches and the area of the lake.

A About 1400 yards.

Q How do you calculae that, sir, at 1400 cubic yards? Try to make it clear for all of us who are lay people so that we can understand.

A At 1.75 acres, that's what we are referring to, you multiply that by 43,560 square feet in an acre, and you get square feet that is covered. Then you are taking only six inches out so you multiply it by .5, that being half a foot, six inches, and we get another number; that

gives me cubic feet.

We divide cubic feet by 27. A cubic yard is three foot by three foot and three foot, and three by three by three is 27. So you divide by 27.

Q 27 cubic feet to one cubic yard?

A Yes, and you have 1411 cubic yards of material.

Q Proceed then with the explanation of your computation.

A So the quantity is fixed.

The second method I thought of would be to go in again with a rubber-tired machine, stockpile it on the lake bottom after it is drained, and then come in with ten-wheelers, loaded on a truck.

Q What is a ten-wheeler?

A A large dump truck that has ten wheels. There are dual wheels in the back. The large size wheels -- it is these great big trucks coming through the street and hauling garbage, those are ten-wheelers. They have twelve cubic yard bodies. We made assumptions that we could load them up to ten cubic yards and we would come back at another time, load them on the truck, and haul them away to the immediate

Q Is there any problem of disposing of the material that is loaded into the truck?

A Not at that particular area there is not any,

not in the immediate area.

Q Why do you say that?

A There are enough commercial properties and low flatlands that people are always asking for fill.

Q Is that where you would get rid of it?

A Yes.

Q Is that far or near?

A Anywhere along the road. There would be no hesitation in my mind of finding a place that would allow you to dump.

Q Nearby?

A Yes.

Q Did you use figures and arrive at the totals under each of the two methods that you used?

A Yes.

Q Give us your totals for the first method.

A The total for the first method would be about--the figure I am using is $2500, and the figure for the second method is about the same. There would be no material difference in computing it as to what I have to do.

Q Is there any necessity or desirability of recovering the bed of the lake with any new material?

A No.

Q How much time, in your opinion, would be

1 required to bulldoze or move this material, as you describe?
2 A For purposes of my estimate, I allowed probably
3 about two days of just stockpiling it on the lake.
4 Q Under either method?
5 A No. The first method I had to push to an area,
6 and that would take me twice as long to do.
7 Q That would be four days?
8 A Say four days.
9 Q And the second method?
10 A The second method would be two days of stock-
11 piling.
12 Q And the first method where you were going to
13 reseed, and it did not involve hauling it away, the second
14 method did?
15 A Yes.
16 Q So under method number one you spent more time
17 moving the material, but you had no time removing it or
18 taking it away; is that correct?
19 A That's right.
20 Q The second method you have less time piling
21 up the earth but you had to use time to take it away?
22 A That's right.
23 Q I am now going to ask you to shift gears
24 because I am going to a different subject.
25

How long have you been in the Sullivan County area?

A Thirty-five years.

Q Were you in court when Mr. Rieber testified --

MR. ORSECK: I would object to any of the balance of the question.

THE COURT: Let's see what it is.

Q -- about Lansman's bungalow colony, the Woodlawn bungalow colony, and the East Pond bungalow colony?

A Yes.

Q Are you personally familiar with those three places?

A Yes.

Q Have you ever done any work in any of them?

A Yes.

Q Which ones?

A All three.

Q What was the nature of what you did for them?

A Lansman's, we did the swimming pool.

Woodlawn, we did some trusses, design of some trusses for him on a large span on the social hall.

Q Trusses --

A They are supports for the roof.

East Pond was a sewarage system.

Q What is the nature of the development along the approach roads on which the Doralee colony is located?

A I would say primarily commercial or industrial.

Q What is the development along the roads on which the other three are located?

A Primarily rural.

Q If you compare the Doralee with any of those other three colonies do you conclude they are equal or different?

MR. ORSECK: I have to object.

THE COURT: I have to sustain the objection on the ground of form. The question is too broad.

Q What is the appearance of the buildings and physical facilities of any of these three colonies as compared with the buildings and physical facilities of Doralee?

MR. ORSECK: I object.

THE COURT: Sustained.

Q Will you describe the Lansman's bungalow colony in its physical aspects.

A It is rather a large colony encompassing both sides of the road. It is well-maintained grounds. Immediately you are really struck by that when you drive up. It is in a rural setting. It is on a side road off the

main highway, probably a quarter of a mile off State Route 52, and level land for both sides of the road, and well-maintained grounds and buildings.

Q Are the grounds and buildings at Doralee the equal or different from the grounds and buildings at Lansman's in terms of the appearances youhave described?

MR. ORSECK: I object on the ground there is no proof in this record that he ever in his life was at Doralee.

THE COURT: Sustained.

MR. COLIN: I think it is already in the record.

MR. ORSECK: No, it is not.

Q Were you ever at the Doralee premises, sir?

A Yes.

Q Did you ever do work there?

A I had my men there and I had gone there myself after the men had done the work.

Q That was in connection with the septic tank or sewerage system that you mentioned before?

A That's right.

Q Have you ever been on Old Pond Road and Waverly Road?

A Yes.

Q How often, would you say?

A I drive by there probably every year, once, twice, three times a year.

Q Over the past 35-year period?

A Over the past twenty years, say.

Q Have you observed at the times you were at Doralee --

THE COURT: No, counsel. This is leading. Come to the side bar.

(At the side bar.)

THE COURT: Unless we have more in this regard I am not going to let this in on the basis that he takes a drive out there to do sewerage work and at some undefined time -- I am not sure it is the summer or winter -- and that makes a difference in this case. He takes a drive around. If he took a drive around for half an hour I don't see that that qualifies him to give this jury any informed opinion as to what the place is like, what the bungalows are constructed of, how many there are, or anything of that kind.

We have had very detailed proof of this from a man of yours yesterday, but this man here, in my judgment, does not come up to the level to be permitted to make the broad sweeping comparison you want him to say, that Lansman's is better than Doralee from just looking at it.

There is no foundation here to let you get to

that.

MR. COLIN: This man is only being asked to compare the physical aspects of one to the other. He is an engineer. He is certainly qualified in terms of evaluating structures and facilities.

THE COURT: You have made absolutely no showing that he has every looked at, been in, had anything to do, with any Doralee structures. He may have driven up and may have looked at where he is going to put a septic tank and maybe he was in a position to say, "I remember some bungalows." It was four years ago. It was the middle of the winter. There may have been snow on the ground.

MR. COLIN: If he has seen the bungalows or representative samples of bungalows and seen the other facilities, on the basis of his professional qualifications he is able to compare them.

THE COURT: I permitted a man that you put on the stand yesterday to testify to that because he went there for that specific purpose and was looking for those very things and could intelligently give this jury something. But this man who goes on this property to do a sewerage problem has not acquired that familiarity with the property, that intentional familiarity with the property, that would warrant the opinion you seek to elicit.

MR. COLIN: This is only a physical comparison. If I see two houses I can certainly say that one is a bigger, more elegant house than the other. It is as simple as that.

THE COURT: We do not have enough here. I am not going to let that kind of comparison go to this jury.

MR. COLIN: I will try to build --

THE COURT: I sustain the objection.

(In open court.)

@825 BY MR. COLIN

Q Mr. Adler, when you were at the Woodlawn, Lansman's, and East Pond colonies did you observe the building structures and facilities there?

MR. ORSECK: Objection. We have no time.

THE COURT: Sustained.

Q When were you at Lansman's?

A I probably went there this past year.

MR. ORSECK: I move that that be stricken as not responsive.

Q Have you ever been on the Lansman premises?

A Yes.

Q When were you last on the premises?

A Out of the car, on the premises, some years ago.

Q How many years ago?

A Ten years maybe.

Q Have you passed Lansman's?

MR. ORSECK: Objection.

THE COURT: Sustained.

Q Were you on the premises of Woodlawn?

A Yes.

Q When were you last there?

A Probably two years.

Q 1974?

A Say 1974.

Q How many times have you been on the Woodlawn premises?

A Twice.

Q Have you been on the East Pond premises?

A Yes.

Q When were you last there?

A Probably about two or three years ago.

Q Have you been there more than once?

A Yes.

Q How many times have you been there?

A I would say maybe three or four times.

Q When you were at those places, did you observe the physical facilities there?

A In a general way, yes.

Q How many times were you on the Doralee premises?

A Probably once.

Q When was that?

A Four years ago.

Q That would be about 1972 or 1973?

A Right. In that range.

Q When you were there, did you observe the physical facilities?

A In a very general way, yes.

Q Are you able to make a judgment in your own mind of a comparative evaluation of the nature of the Doralee facilities as compared with the others?

MR. ORSECK: Objection.

THE COURT: Sustained.

MR. COLIN: In view of your Honor's ruling I cannot go forward on this, so I will terminate the examination.

THE COURT: You govern yourself as you feel appropriate. I have ruled on one specific question.

MR. COLIN: I have nothing else.

THE COURT: You may proceed.

CROSS-EXAMINATION

xxx BY MR. ORSECK:

Q Are you really sure that you were physically present once on the Doralee premises?

A Yes.

Q You cannot tell us what year it was?

A I would say it would be '73 specifically because --

Q Forget about the "because."

A I know why I remembered it.

Q Because she hired you to render professional services for her?

A Yes.

THE COURT: "She" being Mrs. Huss?

MR. ORSECK: Yes.

Q Was the lake drained at the time, the lake you have been talking about?

A I don't recall.

Q I want to put this question to you: Assume that there were many hundreds of, perhaps a thousand, tree stumps on the bottom of the lake. Would that at all have affected your excavation estimates?

MR. COLIN: That is objected to.

THE COURT: On what ground?

MR. COLIN: It is an assumption not supported by any evidence in the record.

MR. GRUBBS: I would like to add that the evidence in this record is to the contrary. The witness for the plaintiff was asked about the nature of the lake bottom

and there was no suggestion that there was any such material there.

THE COURT: How about that?

MR. ORSECK: This issue was not raised. I will commit myself to your Honor that by two o'clock I will have a picture taken, a picture showing --

THE COURT: Never mind.

You represent that you are going to competently prove that fact before the trial has ended? On that representation I will let you continue.

MR. COLIN: I don't think such evidence would be competent at this stage of the case, and I object.

MR. ORSECK: I ask the witness to answer the question.

I will ask the reporter to read the question to the witness.

MR. COLIN: You are permitting the question to be asked at this time?

THE COURT: On the representation that a foundation will be established for asking it.

(Record read.)

A Yes.

Q Would it have made it considerably higher?

A Yes.

Q Incidentally, ordinary dry fill excavation, easy digging, what is the going rate in Sullivan County?

A Can you give a little more explanation as to what has to be done when you say that?

Q Let's talk about digging stuff out of the simplest accessible sand-and-gravel bank, moving it from one place to another.

A You asked two questions there. You moved it to a second place, and you dug it. The question is digging.

Q Digging it and moving it a short distance.

MR. COLIN: That is objected to.

THE COURT: Overruled.

MR. COLIN: This assumes facts not in evidence.

THE COURT: This is a test of the soundness of the witness's opinion.

Overruled.

MR. COLIN: There is no digging contained in this case.

THE COURT: He is asking what the going rate is; this is a question of examining into the soundness of his opinion.

Overruled.

A I would look at it two ways. One, whether I would hire the equipment myself to do it as a general

contractor as to what it is going to cost, or to place a telephone call to a contractor and see what they would possibly want.

Q That's all we're talking about. In this case --

A I am talking as a contractor in my pricing as to how low I would be willing to take a job or what range I would take the job hiring the equipment.

Q I am asking if you are hiring a contractor to do it.

A I think that I could get contractors today for a short haul for about one dollar a yard to load it up and dump it across the street.

Q What I want to do for just a moment is to have you assume that what you told Mr. Colin is the fact in the case, for argument's sake. You were talking about removing 1400 yards, were you not?

A Yes.

Q And that was not the easy digging and easy removal that I just put to you by way of illustration for a sand-and-gravel bank, was it?

MR. COLIN: Objection.

THE COURT: Overruled.

A I would say that it is easy digging -- there is no digging. It is muck. If you let it dry you have it

very easy to move out.

Q The equipment has to move considerable, does it not? It has to move over one and a half acres, to pick the stuff up?

A You pick up from each area. You work in an individual area. You stockpile. My method, you would stockpile, load, all over the place so you back your trucks and load the trucks.

Q How long would you let the stuff dry out?

A Probably a couple of months.

Q Would you tell the jury whether or not it is a fact that the only time you could dry up a lake in Sullivan County is during the summer months?

A I would not say the only time. It would be better if you could, but you use it in the fall -- you could never use it in the summer.

Q It is true that you didn't measure the lake itself; isn't that right?

MR. COLIN: I object to that question except from scaling off the map?

A From maps, yes.

Q You never paced or measured the lake itself, did you?

A No.

Q Would you tell the jury the effect of the lake being filled to a height so that the perimeter is thirty or forty feet more extended from the center of the lake than that which you gleaned from your measurement? What would be the effect of that in the area of the lake?

MR. COLIN: That is objected to.

THE COURT: On what ground?

MR. COLIN: It assumes facts not proven. Obviously if you assume a larger lake it is a larger lake. That's the net effect of the question.

THE COURT: That objection is overruled at this time.

Go ahead.

MR. ORSECK: I will rephrase it.

Q If the shore line were, say, thirty feet further removed away from the center of the lake than that which you gleaned from your scale reading, how many additional square feet would there be, approximately?

MR. COLIN: I object to that.

THE COURT: Overruled.

A I would have to look at the drawing, at least.

Q You can make it very approximate (handing).

A About three-quarters of an acre.

Q More?

A More.

Q Is it true, Mr. Adler, that you have a progression? In other words, each foot more than thirty feet there would be more square footage not in the same proportion per foot but it would progress? Each foot would be more and more on a percentagewise addition of square feet than the previous foot; isn't that true?

MR. COLIN: Objection, your Honor.

THE COURT: I don't follow the question.

Q Assume the lake to be a circle. Would you do that?

A Yes.

THE COURT: Do you need to get into this, given his prior answer?

MR. ORSECK: All right, your Honor.

THE COURT: Let me ask you a question so that the jury and I clearly understand what you are saying.

You said if you were to get someone in Sullivan County to go to a highway-type sandpile you could get that sand put into a truck and moved a short distance for one dollar a cubic yard?

THE WITNESS: Yes.

Q Did I understand from earlier testimony that one of these ten-wheelers you talked about carries ten yards?

A Or twelve yards if you load it right.

Q That means that you can get one of those trucks and the driver to move ten yards of sand for ten dollars?

A The price for that truck for a ten-wheeler, would run $20, $25 an hour. Allowing $200 a day, I could put for $50 an hour a front-end loader for what you gave me, the particular problem; I could push out 2,000 yards a day, which would cost easily, with no sweat, 2,000 yards a day out of a sand pile maybe 2,000, 3,000 yards, it would cost me $400 for the loader and, for really a short run, maybe two or three trucks. You would be making a thousand a day if you had a sand pile, something of that nature.

THE COURT: The truck takes ten minutes for the run and --

THE WITNESS: Say you run four trucks, if it is a real short haul, five trucks even, say $200 a day. You would make $500 a day just moving that.

THE COURT: Proceed.

Q Let's get back to the stumps. Stumps, depending on the circumference, have to be individually removed by a bulldozer operator with a cable, don't they?

MR. COLIN: May I have a continuing objection to this line.

THE COURT: You may.

A Yes.

Q If there are hundreds of stumps you cannot do it with a front loader; you have to get in there with a bulldozer and a man, and they have to cable every stump and pull them out?

A If they don't move with the dozer, then you have to cable them. There is a lot of "ifs" in that. We have done it both ways.

Q Will you tell the jury about the tow-yard efficiency of carting away stumps. There is a lot of air with each stump you are moving, correct?

A Yes.

Q If the stumps are large enough you might get only two or three of them in a truck?

A That's right.

Q That would be, of course, not just more money, it would be a lot more money. It would be a whole other job, correct?

A Yes.

Q Would you tell the jury whether or not you were talking about a union or non-union wage scale when you were talking about a bulldozer operator. You told this jury that for $50 you could get a bulldozer.

A For $50 I could get a five-yard loader and that would include probably a union operator because the scale of the operator doesn't mean anything more.

Q $50 an hour?

A If I ever got a machine that big for sand piles -- I would not use it particularly for this job.

Q Mr. Colin never spoke to you about the lower lake, did he?

A No.

Q When, for the first time, did you learn you were going to be a witness here today?

A A couple of days ago.

Q What does that mean precisely?

A Tuesday and Wednesday. Maybe Saturday night or Sunday. I think Sunday.

Q Who called you?

A Mr. Baum.

Q You understand that Mr. Baum is the personal attorney for Monticello Gas & Oil?

A Yes.

Q You are testifying in this case because Mr. Colin called you; is that right?

A I spoke to Mr. Colin on the phone. Mr. Baum contacted me, gave me Mr. Colin's name, and I spoke to him

on the phone. Yes.

Q Just so the jury perfectly will understand, you and I know each other a long time?

A Yes.

Q As a matter of fact we are friends.

A Yes.

Q You have testified for me in court before, haven't you?

A Yes.

Q And I have always paid you?

A Yes.

Q Tell the jury whether or not you made arrangements with Mr. Baum to be paid?

A I spoke to Mr. Baum and I told him I am going to charge him our per diem rate.

Q Which is what?

A $250 a day.

Q That's for yesterday?

A That's for yesterday.

Q And for today?

A Yes.

Q That's all?

A Mileage.

Q How much does that amount to?

A I don't know what the trip is, but our standard is 17 cents a mile. That's what we pay our employees.

Q What else?

A Any time that I had in the office that I put into the job to examine the job, that would be a number of hours, and charge him at $30 an hour for that time.

Q Assume that the next half hour you are out of here and you are on your way home. Tell the jury, without breaking it down -- I want one number -- what the bill is going to be.

MR. COLIN: I object to that.

THE COURT: Overruled.

A Probably $600.

Q Do you remember it to be a fact that for the professional services as an engineer in the field not having to do with litigation that you performed for Doralee back in 1973 your charge was $200?

A I don't recall, but it might well be.

Q That was for you doing a professional job?

A Yes.

Q That which you are trained to do, and the way you make your living in general, right?

A Yes.

Q Did Mr. Colin or Mr. Baum give you the

hypothetical facts upon which your testimony was predicated? In other words, did they tell you how deep the digging had to be at the lake bottom?

A No.

Q Who gave you --

A I shall not say no. At the start of it I was given the name of Mr. Sam Levine who had probed the lake in the previous year, who happens to be ill right now, and I talked to him on the phone and I have known him for many years.

Q What did Mr. Baum tell you that your testimony was going to relate to? In other words, what were you hired to say?

MR. COLIN: I object to that.

Q What were you hired to testify about?

MR. ORSECK: It seems to me to be a matter of semantics.

THE COURT: That is overruled.

A I was asked if you had to remove the bottom of this lake how much money would it cost to remove the material from the bottom of the lake, the larger lake, and that's all. I was to speak to Mr. Levine, and he would tell me, give me, some insight as to what was on the bottom. He had a knowledge.

Q Do you remember the Monticello Gas & Oil plant across from Doralee?

A In going by it was on the right side. Not specifically. I had never gone on their property.

Q I am talking about Exhibit 1, Mr. Adler. That is the same as the exhibit you testified to, except that it contains a wider area; is that right?

A Yes.

Q It does show the MGO property, does it not?

A It has writing on here, MGO.

Q From your actual knowledge out on the field that's properly placed on that document?

A Yes. I would say it is so.

Q Without a scale would you quickly eyeball it and tell the jury whether or not it is true that that piece of property in area in the dotted line where it says MGO is less than a quarter of an acre? Eyeball it and we will talk in generalities.

MR. COLIN: I object. It is improper cross and goes beyond the limits of anything raised on direct examination.

MR. ORSECK: Do you want to know what I intend to prove on it that is relevant to the direct?

THE COURT: I will accept your representation.

Overruled.

A When you say "area," there is letters MGO and there are dots around it which do not include buildings around it. It is not the property, it is just a piece of whatever MGO owns. I have no idea what they own.

Q I'm asking you to please answer my question.

A You said the property --

Q I said the dotted area. I specifically said that.

A Yes. It is less than a quarter of an acre.

Q Again, in generalities -- and I know jurors don't like that -- an eighth of an acre might be about it?

A I would say yes.

Q Are you aware that in the summer of 1973 Cities Service hired Cooper & Alisio and paid them to excavate that property for a total of -- 2650 and 1800 -- 4400 for that little bit?

MR. COLIN: I object to that.

THE COURT: Overruled.

Q Are you aware of that?

A No, I am not.

Q Isn't that easier digging than in a lake?

A I have no idea what you are talking about digging.

In 1973 weren't there buildings there, pipelines and other things?

MR. ORSECK: They are still there. I have no further questions.

THE COURT: We will take our recess now.

(Recess.)

MR. COLIN: I have been informed by Mr. Liddle, my associate, that during the recess he heard Mrs. Huss make a remark in the corridor outside the courtroom in a loud voice while jurors were standing in the doorway of the jury room fronting the corridor, and the remark was to the effect that Cities Service has plenty of money to pay off witnesses or buy up witnesses. This, Mr. Liddle says, was clearly within the hearing of jurors, and I think it is a serious circumstance which may affect the integrity of this trial.

THE COURT: Mrs. Huss, you are the one who it is alleged did something. Do you have any --

MR. ORSECK: Before she speaks, I want the Court to know that I have been in this room all the time so I cannot help one way or the other. I have been in here preparing my examination.

MRS. HUSS: I said it to Donnie, near the ashtray in a low tone, and he was close by, and that's all.

THE COURT: You did use words --

MR. LIDDLE: That's not true, your Honor.

MR. COLIN: Perhaps Mr. Liddle should say what he observed.

MR. ORSECK: I'm advised Mr. Baum never heard it and he --

MR. BAUM: Just a minute.

MR. ORSECK: Mr. Baum came out after that occurred. I would respectfully --

THE COURT: Let's establish something.

Mrs. Huss, you said you said something to the effect that Cities Service has money to buy off witnesses?

MR. DONALD ORSECK: Your Honor, I am Gerald Orseck's brother and co-counsel. Mrs. Huss, outside the door, while smoking a cigarette, said to me that Cities Service has plenty of money for this case and how come they are not paying us. That was the gist of it. A juror may have been on the other side, I don't know. I didn't see anybody. I was waiting to make a telephone call. I don't think that it was overheard. It was not in a loud voice. It was a communication between the two of us and it would be --

THE COURT: Mrs. Huss, what is it you recall saying, so we have it directly from the person in question?

MRS. HUSS: I said to Mr. Adler in the courtroom that he was never at my place --

MR. ORSECK: We are not asking about that.

THE COURT: This is about Cities Service having money.

MRS. HUSS: To pay his fee for the case.

THE COURT: Give me the whole conversation.

MR. COLIN: Mr. Liddle heard the whole conversation.

THE COURT: I am asking Mrs. Huss to tell me the whole conversation as she recalls it.

MRS. HUSS: That was my first remark to Mr. Adler.

THE COURT: We are talking about the one that something was said that a juror might have overheard.

MRS. HUSS: That was my concluding remark.

THE COURT: What did you say?

MRS. HUSS: That Cities Service has large fees to pay on the case like in the case of Mr. Adler since he was never present at my place. I asked him to come and he refused. He sent a kid who was working for him.

THE COURT: That's what you said?

MRS. HUSS: Yes.

THE COURT: You have a different memory of it?

MR. LIDDLE: Quite a different memory. I was in the rest room. As I was leaving the rest room, Mr. Grubbs

said, "She is making comments in the presence of a juror." As I walked out of the rest room, located at the back of the area -- you can look in the jury room if the door is open -- there was a juror standing there with his head hanging out. As I walked towards Mr. Orseck and Mrs. Huss, Mrs. Huss turned toward me and addressed me in a loud voice and said, "Cities Service has a lot of money to pay off witnesses doesn't it --"

At that point I addressed Mr. Orseck and said to him, "Mr. Orseck, we are in the presence of jurors. I wish you would ask your client be quiet and refrain from these comments, otherwise I will have to go to the judge with that."

Right behind Mrs. Huss was Juror No. 2 who was in the telephone booth with the door open. This was Juror No. 3 -- and within a matter of seconds Juror No. 6 was also at the door.

Mrs. Huss responded to me that there were no jurors present, and as we all turned around there were jurors present.

MR. ORSECK: Your Honor, might I suggest this? I would move that the Court interrogate the jurors, whether or not they heard any remarks made by any c[illegible]l or by any litigants during the recess, and if they did I really have

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no choice but I would move for a mistrial.

THE COURT: Is that your application, Mr. Colin?

MR. COLIN: I think it is the proper procedure, your Honor, to make sure that the integrity of the trial and the jury process has not been in any way --

THE COURT: I would agree with you.

I am asking you if that is your application, because the courts are always reluctant to interrogate jurors during the course of a trial. I feel it is appropriate. I assume that you join in the motion that I do that.

MR. COLIN: Yes, sir.

MR. GRUBBS: I agree, your Honor.

Do you think the presence of counsel might in any way embarrass the jurors if you question them in the robing room?

THE COURT: The authorities are to the effect that it is error if you are not there.

MR. ORSECK: I think if my brethren would consent, we all could knowingly waive our right to be present, and I think that would be the best way to obtain an answer from a juror, an individual interrogation by the Court alone of each juror. I cannot force anybody to stipulate, but I think that would be the best way. It is up to

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these men.

MR. COLIN: I think it would be best, if your Honor please, that counsel be present.

MR. ORSECK: Then we will be present.

THE COURT: Would you, in the next two or three minutes, please write down for me the substance of any question that you might wish me to ask. I will do the interrogating. I am not saying I am going to be asking the questions that you asked me to ask, but you can give me guidance as to what I should be asking.

(In the robing room.)

(Juror No. 1 entered the robing room.)

BY THE COURT:

Q During this recess, did you have occasion to hear any comments or remarks made in the corridor by any party or any representative party, or anybody else, having to do with this case?

A No.

Q Has anybody said anything to you about hearing anything that anybody said in the corridor that had anything to do with this case?

A Outside where the elevators are?

Q Yes.

A No.

THE COURT: Is there anything that you gentlemen want to ask of this witness?

(Pause.)

THE COURT: I will excuse you at this point.

Don't discuss the subject of this inquiry at this moment with anybody you rejoin.

Thank you very much.

(Juror No. 1 was excused; Juror No. 2 entered the robing room.)

BY THE COURT:

Q I am speaking to the jurors, as you can see, on the following subject:

During this past recess did you have occasion to hear anything said in the public corridor by the elevators by anybody connected with this case, a party, counsel, or otherwise?

#26 A I was speaking on the telephone and I saw people come out, and I was very surprised: I heard the words "Cities Service Oil," but that's all I heard and I don't know who said it. I didn't hear any discussion. I didn't hear anything of substance.

Q You just heard the words "Cities Service Oil"?

A Something like that. I heard a word -- I heard a phrase connected with the case, but I didn't hear any

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discussion of it.

I made an important phone call about a water leak in my apartment.

Q Other than hearing the words "Cities Service Oil," you don't recall hearing anything at all?

A I'm positive I didn't hear anything. I was concentrating on my telephone call and heard this.

Q Did anybody say to you in the jury room since the recess that they heard anything?

A No. I was talking about health foods.

THE COURT: Is there anything further, gentlemen?

(Pause.)

THE COURT: Thank you. When you get back to the jury room, what we discussed here is to be kept to yourself at this time.

Thank you very kindly.

(Juror No. 2 was excused; Juror No. 3 entered the robing room.)

BY THE COURT:

Q Sit down for a second.

I would like to ask you briefly during the past recess that we have had did you have occasion to be in and around the public corridor?

A Yes.

Q Did you have occasion to hear any remarks made by any party, or any lawyer for a party, any representative of a party having to do with the case itself?

A No. The only thing I heard, I noticed somebody said something, I think, to Mrs. Huss, that the juror was right over there. I didn't know what it was, what they were talking about. It was the young assistant to Mr. Colin, and he went inside, and that was it.

Q You were in the doorway of the jury room?

A Yes.

Q Did you have occasion to hear anything that Mrs. Huss might have said?

A I didn't hear a word.

Q Has anybody in the jury room said anything to you about anything they might have heard anybody say?

A No. I can speak for most of us. We have been trying to stay out of everybody's way.

THE COURT: Any questions, gentlemen?

(Pause.)

What we talked about here at this point is for you to keep to yourself.

(Juror No. 3 was excused.)

THE COURT: How much further do we have to go?

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We have had the man that was in the door and the woman in the phone booth.

MR. COLIN: I think you have three more and you might as well clear it.

THE COURT: I have five more.

MR. COLIN: I think it would be better to clear the record.

MR. GRUBBS: I do, too.

(Juror No. 4 entered the robing room.)

BY THE COURT:

Q Just a couple of brief questions.

During the last recess, did you have occasion to be in and around the public corridor at the elevators?

A No.

Q Did you have occasion in any way to hear anything said by any party, or any representative of a party, or any lawyer about the case?

A No, sir. I was inside all the time.

Q Did any of your fellow jurors mention anything to you that anybody may have been talking about in the corridor during the trial?

A Not that I know of, sir.

THE COURT: Any questions?

(Pause.)

THE COURT: You are excused.

(Juror No. 4 was excused; Juror No. 5 entered the robing room.)

BY THE COURT:

Q Good afternoon. During the last recess that we had, did you have any occasion to be out in the public corridor?

A No, sir.

Q Did you have any occasion to hear any lawyer, or any party, or any representative of any party, saying anything about the case?

A No.

Q Did any of your fellow jurors speak to you as to what they might have heard somebody say in the corridor?

A Nobody said anything to me.

THE COURT: Thank you very much.

(Juror No. 5 was excused; Juror No. 6 entered the robing room.)

BY THE COURT:

Q During the last recess, did you have any occasion to be out in the public corridor?

A Yes, to make a phone call.

Q Did you have occasion to hear any comments or remarks made touching upon this case by any lawyer, or any

party, or any representative of any party?

A No.

Q You heard nothing at all?

A No.

Q Have any of your fellow jurors mentioned to you that they heard anything spoken in the corridor?

A No. It was not told to me.

THE COURT: Are there any questions?

(Pause.)

THE COURT: Thank you very much.

(Juror No. 6 was excused; Alternate Juror No. 1 entered the robing room.)

BY THE COURT:

Q During this recess that was just concluded, did you have occasion to be out in the public corridor where the elevators are, near the phone booth?

A No.

Q I would assume then that you did not hear any remark or comment made about the case by any party, if any was made?

A No.

Q Nothing touching upon the case in any way?

A Not at all.

Q Have any of your fellow jurors mentioned to you

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that any juror had heard any comments made about the case by anybody?

A Not at all.

THE COURT: Thank you very much.

(Alternate Juror No. 1 was excused; Alternate Juror No. 2 entered the robing room.)

BY THE COURT:

Q During this last recess, did you have any occasion to be out in the public corridor?

A No.

Q I would assume then that if any remarks were made by any party, or counsel, or a representative of a party, or anyone else, you did not hear any remarks made about the case?

A No.

Q Did you hear any of your fellow jurors remark to you about any comment that they might have heard?

A No.

THE COURT: Any questions?

(Pause.)

(Alternate Juror No. 2 was excused.)

THE COURT: Mr. Colin, we have Juror No. 2 saying she heard the words "Cities Service Oil," which I assume anybody might catch because they are used to listening

to those words; but beyond that, I don't find that there is anything at all that affects this.

MR. COLIN: I would say to some person the name of an oil company could be a dirty word, but I don't think it would be in any way a basis of claim on my part, from what I have heard, and I make no claim that the proceedings have been tainted in any way.

(In open court.)

(Jury in box.)

CROSS-EXAMINATION

BY MR. GRUBBS:

Q I believe you testified that on previous occasions you had testified as an expert for Mr. Orseck; is that correct?

A Yes.

Q You had occasion to drive past Mr. Orseck's office from time to time?

A Yes.

Q At any of those times did you observe any sign of any other office being at the same location?

A To the best of my recollection, yes.

Q Would you be good enough to tell the Court and jury what that sign indicated?

A To the best of my recollection it was a real

estate broker.

Q What was the name of that real estate broker

A Edison & Ratowski.

Q Was that sign at the entrance to the building of Mr. Orseck's office?

A Yes. To the best of my recollection, yes.

MR. ORSECK: May we have a time, please?

Q Was it recently or sometime in the past?

A I don't recall. They probably built the building four years ago, I would guess. This was two or three years ago, at least, I think.

Q In connection with your work as a civil engineer, have you had occasion to examine bottoms of lakes and ponds?

A Yes.

Q About how many, would you say?

A I have probably seen a couple of dozen over a period of years.

Q Is there any particular formation that you have uniformly found in examining those lakes?

MR. ORSECK: I object

THE COURT: Sustained.

Q Would you tell us what is your experience of having examined a couple of dozen lake bottoms in the area

of Sullivan County?

MR. ORSECK: I object.

THE COURT: Objection sustained.

Q Have you ever been engaged to remove any lake bottom or pond bottom?

A I have removed bottoms. I have moved bottoms out.

Q Would you be good enough to tell us the nature of the material you found in that lake bottom?

MR. ORSECK: I object.

THE COURT: There is no foundation for that applicability to this case. Sustained.

Q Have you ever found that in all the ponds you have seen there is a certain muck on the bottom?

MR. ORSECK: I do object, your Honor.

THE COURT: On what ground?

MR. ORSECK: The only testimony in this case which was by a State witness and another was that this bottom was not the same as any other bottom.

MR. GRUBBS: If your Honor please, muck was identified by a prior witness.

THE COURT: We have first-hand testimony as to this very lake. Why does it become admissible for this gentleman to testify as to what may be at the bottom of others?

MR. GRUBBS: I would like to show what uniformly is present in all stagnant bodies of water of this nature.

THE COURT: I will sustain that. We had two witnesses who looked at this very lake. I will sustain that.

Q With your experience with lakes or ponds, does there come a time every so often when they should be cleaned out?

MR. ORSECK: I object to that, your Honor.

THE COURT: Come to the side bar.

(At the side bar.)

THE COURT: What is the basis for this man being (a) competent to testify about this, and (b) there being any factor which you are asking him to tell? I have been a member and an officer and general counsel some years ago of a club up in Putnam County that has a pond that is 500 yards long. We never drained that. It is checked periodically by the Health Department and it is always in good condition. I have been a member there now for going on seventeen years. What is the basis for your claim that you have to do this?

MR. GRUBBS: It is my understanding that whenever you have a stagnant body of water in the vicinity of a swamp that the accumulation of muck does, over the years --

THE COURT: This is not a stagnant body. This drains at one end, and drains into another lake, and that lake drains into another. It is not stagnant.

MR. COLIN: It is slow moving.

THE COURT: You have not established that this man even knows what this lake is like. If you establish that this was a stagnant pond, I might agree with you, and I might agree with you if this man knew of some practice in that regard. We don't have either of those on this record.

I will sustain the objection.

(In open court.)

BY MR. GRUBBS:

Q Sir, would the fact that a pond is being fed from water coming from a swamp or marsh land indicate to you as to what would be brought into the lake or pond bottom?

A Yes.

MR. ORSECK: Your Honor, I object to the question on the hypothesis. It was testified that there were underground streams by somebody who saw them, Mr. Rosch, when the lake was drained.

THE COURT: Even given that, I will permit that to stand. Certain things do come from a swamp down to this lake.

Go ahead.

Q In the lake bottom that you have examined, have you found in every case there are certain substances on lake bottoms?

MR. ORSECK: Objection. It is obvious that there are always substances on the bottom.

THE COURT: I am going to sustain this for the same reason I sustained your objection.

Q Are you familiar, or have you had any experience or observation, as to the effect of vegetation on the bottom of a lake or pond?

A Yes.

Q Would you tell us what that effect is?

MR. ORSECK: Objection. We don't have any testimony of any vegetation on the bottom of this lake.

THE COURT: I thought there was some testimony that oil had gotten on certain vegetation in the swamp and that was one of the ways it was carried down to the bottom of this lake.

Am I right?

MR. GRUBBS: That's my understanding.

MR. ORSECK: That is mine, too.

THE COURT: I will overrule the objection.

(Record read.)

THE COURT: As a civil engineer you are being asked to testify here to what is basically a botanical matter, it seems to me.

THE WITNESS: No. As a matter of fact, we just did a study for the Municipal Water Supply for the municipality where it pertains -- civil engineering is a pretty broad field, and as it pertains to water supply and all its ramifications we are, in general, familiar with it: the putrefication, the decomposition of any of the green matter, the bushes and the branches that grow, the leaves that fall; the decomposition turns to a black muck on the bottom of lakes or ponds and eventually we call that peat.

Q Does that disintegrating vegetation have any odor to it?

A Yes.

Q Does it have any slime to it?

A Yes. It looks like a slimy mass, muck.

Q Does it have a tendency to reflect or refract light sometimes?

A It could when it is wet. It definitely would.

Q Do you have any map with you showing the nature of the terrain or vegetation in the vicinity of Doralee Estates?

MR. ORSECK: He has a contour map, if that's

the question.

THE COURT: Do you have any other such map?

THE WITNESS: I have an aerial photograph of the area.

Q Do you have any map that shows in color the various types of vegetation?

A Not in color. Yes, I have a United States Geological Survey Map.

Q Produce that.

A That would be in color.

MR. ORSECK: We will consent that that be received in evidence.

THE COURT: Are you offering that in evidence?

MR. GRUBBS: Yes.

MR. COLIN: I have no objection.

THE COURT: It will be received.

xxx (Defendants' Exhibit NN received in evidence.)

Q I show you this exhibit, NN, and ask you from thap map can you tell what if any areas in the vicinity of Doralee Estates is swampland?

A Well --

MR. ORSECK: Your Honor, the question is what does that map indicate?

THE COURT: Correct.

A W hat does the map indicate? Is that the question?

Q Either way.

THE COURT: It has to be what the map indicates.

Q Does the map indicate that there is any swampland in the vicinity of Doralee Estates?

A Yes.

Q Be good enough to take this pencil and circle the swamp areas in the vicinity of Doralee Estates as indicated by that map.

(The witness complied.)

Q Are there any swamp lands or marsh lands on Doralee Estates property itself?

MR. ORSECK: Objection to the form of the question.

THE COURT: Does the map reveal any much? Go ahead. Does the map reveal any swamp lands on the Doralee property?

A Possibly. On this map.

Q Circle that.

A (The witness complied.)

Q Be good enough to tell us approximately the area of the swamp land on Doralee itself.

MR. ORSECK: By definition it cannot be answered. He does not know for sure it is there.

THE COURT: Sustained.

THE WITNESS: You are talking about this map?

Q Do you know whether or not there is any swamp land or marsh land on Doralee Estates itself?

MR. ORSECK: He answered that. I object to that as repetitious.

A I would say that there is marsh land and wet land immediately adjacent to this lake at Doralee.

MR. ORSECK: I move that the answer be stricken. It is not responsive. We do not know the answer to the question any more than we did before it was asked.

THE COURT: You may cross-examine and make an appropriate motion.

Q Be good enough to tell us about approximately what is the area of the swamp or marsh land on Doralee Estates itself?

A Immediately contiguous to that lake -- maybe ten acres.

Q Would you be good enough to tell us the area of swamp land that you have drawn in the first instance?

A Probably a square mile.

Q How close is that square mile of swamp land

to Doralee Estates?

A I missed another piece here.

Q Let me restate the question.

Was this approximately one mile square of swamp land that you have circled on Exhibit NN? What is the closest point of that mile square of swamp land to Doralee Estates?

A Two thousand feet.

Q Would you be good enough to mark the areas that you have encircled as swamp land with an S.

A (The witness complied.)

MR. GRUBBS: That's all. Thank you.

MR. COLIN: May the record show that the markings and the letter S applied to the map by the witness are in red crayon.

FURTHER CROSS-EXAMINATION

xxx BY MR. ORSECK:

Q Throughout this case counsel have been referring to a marsh land or swamp in a derogatory manner.

MR. GRUBBS: I object to that.

MR. COLIN: I object to that.

MR. ORSECK: That's a fair preamble -- or else do they consent it is a nice place? It is the only way I can preamble that question.

MR. COLIN: I don't think you are entitled to a preamble.

MR. ORSECK: Do you consent?

MR. COLIN: I don't consent to anything.

MR. ORSECK: Of course not.

Q Are you aware that the swamp that you encircled is a New York State Wildlife Preserve marsh protected by the State of New York?

MR. COLIN: I object to that.

MR. GRUBBS: I object.

THE COURT: Overruled.

A No. I'm not aware of that.

Q Do you say it is not?

MR. GRUBBS. That is objected to.

MR. COLIN: Objection.

THE COURT: Overruled.

A I don't know the answer to that.

Q I believe you testified that peat might refract light.

A When it is wet peat might. We are talking about muck. I went further as to what happens, how you get peat.

Q What would a rainbow on the surface of a lake indicate to you?

MR. COLIN: I object to that.

MR. GRUBBS: Objection.

THE COURT: Overruled.

A It would indicate something that had a light specific gravity that might be floating over the surface.

Q Like what?

A Like oil.

Q You cannot think of anything else?

MR. COLIN: It is objected to.

THE COURT: Overruled.

A Oil is a very loose word. It could be a lot of different forms.

Q Are you sure you saw a sign, Edison & Ratowski, in front of our office?

A I saw your sign, the original sign, and the same type of letters or something on it, if my memory serves me correct. I remember seeing their name at your premises.

Q Could it have said Empire Mutual Insurance Company, Orseck Law Offices?

MR. COLIN: Objected to.

MR. GRUBBS: Objected to.

A It could have had that also.

Q You are not trying to tell the jury that Edison & Ratowski are in our building, are you?

MR. GRUBBS: Objection.

THE COURT: Overruled.

A No.

Q Or that they ever were?

A I am just telling you the sign that I saw.

Q The exhibit I hand to you obviously is our office, is it not (indicating)?

A Yes.

Q Obviously it was taken not during the winter months, right?

A Right.

Q There is no sign on there about --

MR. COLIN: Objection.

MR. GRUBBS: Objection.

MR. COLIN: If counsel was aware there was a sign, it would be quite improper to be examining --

MR. ORSECK: I don't practice that way, Mr. Colin.

THE COURT: Put a question to the witness.

Q Is that a picture of our office taken during some of the warmer months?

A Yes.

Q There is no sign on it, is there?

MR. GRUBBS: Objection.

Q Is there?

A No, not in that picture.

THE COURT: Do you offer that picture in evidence? I think you ought to establish when it was taken.

MR. ORSECK: July of 1975.

I will be glad to offer it, your Honor.

MR. COLIN: That's not when the witness testified he saw the sign.

MR. ORSECK: I understand.

THE COURT: Is there any objection?

MR. COLIN: Yes. It is a different time, a later time than the time fixed by the witness for his observation of the sign.

THE COURT: That makes it a question for the jury to consider.

I will overrule the objection.

xxx (Plaintiff's Exhibit 78 received in evidence.)

MR. ORSECK: May we approach the side bar, your Honor?

THE COURT: Yes.

(At the side bar.)

MR. ORSECK: Your Honor, one of the canons promulgated by the New York State Bar states that an attorney should not testify during the course of a trial.

THE COURT: Right.

MR. ORSECK: I think that since an issue has been raised oncerning our office that something should be put on the record even though it is not presently before the jury.

I represent to this Court that the year before in 1974 Empire Mutual Insurance Company negotiated for two weeks with Edison & Ratowski to take a cellar or basement room, which is around the back here, which is lower, and that was never effectuated. There was never any sign of Edison & Ratowski on the front.

Either my brother or I could testify to that, your Honor, but I don't like to testify because of the canon. I am content to leave the record as it is. I thought I was professionally obligated to make some sort of statement on the record, which I have.

THE COURT: All right.

(In open court.)

REDIRECT EXAMINATION

BY MR. COLIN:

xxx Q Mr. Adler, you have made a number of markings in red crayon on this map. This has been identified as NN. In the interest of clarification, I ask that you be good enough to place on the swamp area that you have delineated

at the Doralee premises the initials D L so that out of the several areas you have outlined in red we know which one is the Doralee. Do that with this black Magic Marker, please.

A (The witness complied.)

MR. COLIN: That's so that the jury will be able to understand this better if they look at it.

Q Mr. Adler, you were asked by Mr. Orseck about some work that was done at the MGO oil plant, and I ask you, sir, whether your estimates assumed the removal of earth from a depth of one to three feet?

A No.

Q Did your estimates assume bringing new fill material in to cover what had been removed?

A No, it did not.

Q What is "bank run"?

A "Bank run" material is the earth, usually sand or gravel material, as it comes right out of the bank. You try to dig into a bank for the ease of load. That's the raw material. It has not been screened or processed or anything else.

Q Did your estimate assume replacing the excavated material with bank run earth?

A No, it did not.

Q Did your estimate involve removing fences?

A No, it did not.

Q While Mr. Orseck cross-examined you, Mr. Adler, you made mention of conversations with Mr. Levine about the lake. Do you recall that?

A Yes.

Q Who is Mr. Levine?

A Mr. Levine is a civil engineer. He has practiced engineering in our area for approximately thirty years. He is considered very, very capable.

Q When you spoke with Mr. Levine, did you learn from him that he had direct personal knowledge as to the lake bottom at Doralee?

MR. ORSECK: That's really hearsay, pure.

THE COURT: Sustained.

MR. COLIN: I think the door was opened by cross-examination.

THE COURT: No. He was asked whether he got the information from people connected with parties in this case. That's for an entirely different purpose. It was thrugh that question that the name Levine came in.

RECROSS-EXAMINATION

xxx BY MR. ORSECK:

Q Before these last questions, Mr. Colin asked

you a line of questions, did your estimate include this and that. So we have it straight, your estimate didn't include the removal of hundreds and maybe a thousand stumps; is that right?

MR. GRUBBS: Objection.

MR. COURT: Repetitive.

The witness is excused.

(Witness excused.)

THE COURT: Are there any other witnesses, Mr. Colin?

Call your next witness.

MR. COLIN: I call Mr. Liddle.

MR. ORSECK: If this is for a compilation which I trust it is, show it to me.

MR. COLIN: I have shown it to you.

MR. ORSECK: Your Honor, the exhibit that we offered for comparison was objected to. This is the same thing. It contains Doralee's --

THE COURT: Call your witness.

#27 J E F F R E Y L. L I D D L E, called by the defendant Cities Service Oil Co., having first been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

xxx BY MR. COLIN:

Q Are you associated with my law office, sir?

A Yes, sir.

Q Did you prepare a tabulation of the rents at Doralee and the comparable rents at five other bungalow colonies as testified to by Mr. Edison?

A Yes, I did.

Q In respect of the rents at the comparable properties, what figures did you use?

A I used the figures that were supplied to us by Mr. Edison.

Q That is the Mr. Edison who was the witness?

A For Doralee Estates.

Q In respect of the rents for Doralee, what figures did you use?

A I used the figures that appear on Plaintiff's Exhibit 66, which was introduced by Doralee.

Q In respect of the annual changes in the rents from the years 1973 to 1976, what figures did you use, sir?

A I used the equation or formula that Mr. Edison gave the Court when he testified.

Q What was that, sir?

MR. ORSECK: Your Honor, my objection to this

is a simple one: It would seem that there is no evidence being offered. It is a compilation. The compilation, if I looked at it for one moment, I would probably see that it is accurate. However, Plaintiff's Exhibit 66 for identification, we offered another compilation based on other aspects of testimony which likewise is accurate. For the lack of a legal argument I use what is good for the goose is good for the gander. I either object to a tabulation made by counsel of other testimony or, in the alternative, I consent, provided our tabulation, predicated on the same method but on different aspects of the testimony which is in evidence, alo be admitted. It is that simple.

THE COURT: Let's do this: I will rule on one exhibit at a time and I will come to yours when we get to a later phase of the case. At this point I will deal with this one exhibit.

MR. ORSECK: Yes, your Honor.

THE COURT: May I urge this upon you at this point?

MR. ORSECK: Then I would object.

THE COURT: Let's see the exhibit.

MR. COLIN: Your Honor, may I ask that the interruptions by counsel be minimized?

MR. ORSECK: Your Honor --

THE COURT: That was a perfectly valid position.

MR. ORSECK: I object on the further ground that I do question the allocation --

THE COURT: Have youobtained in the exact words what the testimony of Mr. Edison was? As I recall it, there was a general statement he subtracted $50 for the smaller ones and the $75 a year for the larger ones. The question is how far back he took that. There was some equivocation.

MR. ORSECK: I think, counsel, we are in agreement for 1973.

MR. COLIN: We agree.

MR. ORSECK: That's agreement between counsel.

MR. COLIN: This does use the annual differentiation that your Honor referred to.

THE COURT: Aside from the fact that Mr. Edison was using an average and, therefore, when you are using comparable he has the same figure for every bungalow which obviously is an averaging.

MR. COLIN: For the comparable bungalows he used an average unit figure of $1300 and $1100.

THE COURT: That was for every bungalow of a certain size.

MR. COLIN: $1300 for two-bedroom.

THE COURT: The jury should understand that because the figure is $1100 all the way down, and you have juxtaposed it to a specific Doralee one; the jury should understand this is an average and not a specific comparison with that particular unit.

MR. COLIN: We have taken exactly what the witness said. We have taken the precise figures on Doralee that were furnished to us by Doralee.

MR. ORSECK: Nobody is quarreling with that.

THE COURT: I want the jury to be able to understand that. This is an average figure.

On the basis of that it seems to me --

MR. ORSECK: I should be heard for one second, your Honor.

My objection is that the average is not fine enough because he testified to averages. He said his two-room bungalows, two-bedroom bungalows, it was one average of $1300, and you didn't indicate --

THE COURT: He did.

MR. ORSECK: Another thing: A reading of Mr. Edison's testimony, your Honor -- and this I can't vouch for -- I think he talked about Doralee having small increases, and I think that the other bungalow colonies --

MR. COLIN: He talked about $50 a year.

MR. ORSECK: I'm not willing to accept that without being read back.

MR. GRUBBS: Could we have the discussion at the side bar, your Honor?

THE COURT: At this point I will admit the exhibit. The foundation has been laid based upon the testimony of Mr. Edison plus the leases that are in evidence.

MR. ORSECK: If the Court is satisfied that some of the bungalows had $50 increases, I am not satisfied. My recollection is not that accurate. I don't believe that to be the case.

MR. COLIN: I think this is reachin the point of prejudice.

THE COURT: Ladies and gentlemen of the jury, I am going to admit Exhibit OO in evidence. I am admitting it with the instruction to you that a chart of this kind is only valid to the extent that it is based upon evidence that is already in the record. In other words, what it represents is a collecting together in one place of material that has come in, perhaps, from two or three witnesses being put together for purposes of assisting you, the jury, in understanding the case. It is valid only to the extent if you conclude it is support ed by the evidence. If you

conclude it is not, the chart has no independent life of its own.

With that observation, if you find it is not supported in the record, you are to disregard. If you find it is supported in the record, you give it such weight and consideration as you determine it is entitled to have.

With that observation, I admit Defendants' Exhibit OO in evidence.

MR. ORSECK: I realize you have ruled, but I have noticed that your Honor states his recollection of Mr. Edison's testimony is that the smaller units only had $50 increases. This one uniformly shows $175 increases on the comparable for every single bungalow.

MR. COLIN: May I suggest that this should be reserved for cross-examination?

MR. ORSECK: You made a representation to the Court.

MR. COLIN: I think it is prejudicial, the entire colloquy in the presence of the jury.

I would like to pursue this --

THE COURT: Come to the side bar.

(At the side bar.)

THE COURT: You pointed out that this formula of Mr. Edison's was not applied and I didn't catch that

before. That would appear to be so.

Mr. Liddle, if you take the one bedroom, which is $1100, you go back one year and you have taken $175 away from that.

MR. COLIN: That was his testimony.

MR. LIDDLE: This was his testimony.

MR. COLIN: You had two figures: $50 on all Doralee units and $175 on all the other comparables. Those are the two figures. We have clear notes on it. I am certain of that. If your Honor refers to your notes you will find the same thing.

THE COURT: I will reserve decision on that, and I will let you get it out of the transcript. My recollection was different than yours.

MR. ORSECK: Mine, too.

MR. COLIN: Your Honor initially gave those same figures of $50 and $175 in the earlier colloquy.

THE COURT: I know, but I was applying the $50 subtraction on the one bedroom and $175 on the two.

MR. COLIN: There was no other figure for escalation, sir, but $50 for Doralee and $175 for so-called --

THE COURT: This is a matter that can be resolved by Mr. Golden getting the testimony and reading it. Until that time I will reserve decision on that exhibit.

My notes, my recollection, I have a different feeling and a different recollection. I may be wrong. I could have misconstrued his testimony.

Mr. Orseck seems to feel that I have not. Maybe we both are wrong.

MR. COLIN: Your Honor's first expressed recollection was the correct one, I believe.

THE COURT: My first one was different. Whatever I intended to convey you didn't catch it because I intended to convey the thought that on the figures at the other five you took $175 a year off the big ones and $50 a year off the little ones.

MR. COLIN: No, no.

THE COURT: I may be wrong.

MR. ORSECK: I have another basis.

THE COURT: Not yet.

MR. LIDDLE: I think the reason there is such a large discrepancy of what has been represented to the Court on this chart is because Edison underestimated somewhere between --

MR. COLIN: That's beside the point. Mr. Orseck made up a chart comparable to this and it has the same assumptions.

THE COURT: All I am asking is that you

ascertain this from the minutes and then we will go forward.

MR. ORSECK: I have a further objection regardless of the minutes, which is this: You see it is based on an average. We get a preposterous result which doesn't obtain by logic, and that is that in 1973 Doralee was higher than the other bungalow colonies. The reason that is is because of the application of average. It could have been one of them.

THE COURT: I know that. We all noticed Mr. Edison saying that and did a little arithmetic in our heads and came to that.

MR. COLIN: Your Honor, I would like to mark for identification a chart prepared --

MR. ORSECK: It is marked. It is 66 for identification.

MR. COLIN: It shows the same annual $175 escalation on the comparables for both --

THE COURT: Please, Mr. Colin. Don't argue. Let's look at the minutes. We have spent two or three minutes here arguing about what somebody might have said. Look at the minutes.

(In open court.)

THE COURT: Ladies and gentlemen, I will see you at 2:15.

(Luncheon recess.)

A F T E R N O O N S E S S I O N

2:25 P.M.

(Jury in box.)

THE COURT: I overrule the objection to the chart.

Did you look at the minutes?

MR. ORSECK: I have one further objection, and that is this: In the matter of average increases the answer is $150 or $175, not $175. I think it is all a question of fact. None of this has probative value to the jury. All it is is a tabulation, and it would seem to me that this testimony is all for the jury. In other words, there is no independent probative value on these charts.

MR. COLIN: This can be dealt with on cross-examination, your Honor.

MR. ORSECK: The witness has already been here, your Honor.

I believe it is on page 13 of the direct examination. Counsel could figure one of two figures. That would be an indication to the jury that that's what it is. This is a jury question.

T HE COURT: I am going to reserve decision on the chart for a little bit.

You may proceed.

MR. COLIN: May I approach the side bar?

THE COURT: No, no.

MR. COLIN: I did want to ask the basis --

THE COURT: He says approximately $175, and he says the other units were raising much more "$150, $175."

MR. COLIN: This was Mr. Orseck's witness.

THE COURT: It is your chart.

MR. COLIN: I am basing it on the witness's testimony and this is Mr. Orseck's witness.

THE COURT: It is not $175. It is $150, $175. That troubles me a little bit. The evidence is in the record. It may be argued to the jury. The only question is whether the chart goes in evidence. You obviously can argue to the jury anything that is in the record, and this is in the record.

MR. COLIN: This chart is based on $175.

THE COURT: The charts are admissible in the sound discretion of the trial judge. I am endeavoring to determine how to exercise that discretion in the interests of presenting this case as fairly as possible to the jury. I am therefore reserving decision on it at this moment.

MR. COLIN: I should like to be heard, your Honor.

THE COURT: I don't need to. You told me what

it was. You said it is based on the record. I want to give consideration to whether this is of assistance to the Court and the jury or whether it is fairer for you to argue from the transcript itself.

J E F F R E Y L. L I D D L E, resumed.

CONTINUED DIRECT EXAMINATION

BY MR. COLIN:

Q Did you hear Mr. Edison testify on this trial on direct examination by Mr. Orseck?

A Yes, I did.

MR. ORSECK: This is not proper, your Honor.

THE COURT: Let's see where it goes. Maybe it is and maybe it is not.

Q Did you hear this question and this answer at that time --

MR. ORSECK: I object.

THE COURT: Is the question on line 19 page 13?

MR. COLIN: Yes.

THE COURT: I sustain that objection at this point.

MR. COLIN: May I make an offer of proof?

THE COURT: No, counsel. That question and answer are in the record. The only question is whether the chart should go into the record.

Q Mr. Liddle, did you prepare this chart on the response made by Mr. Edison at line 22 page 13 of his direct examination as well as his response at page 13 from lines 11 to 18?

So you may know what I refer to, I show you the transcript.

THE COURT: Before you get an answer to that question, I think you had all better come to the side bar.

(At the side bar.)

THE COURT: If Mr. Liddle testifies that he made it from this, he is not reading the transcript accurately because his chart is a flat unequivocal $175. The witness's testimony is in one answer, "$150, $175," and in another answer it is "Approximately $175." I feel it is unfair to put toyour colleague something that is going to elicit from him a response that says he got $175 from here without all of the qualifications that go into it.

MR. COLIN: After the witness said $175, Mr. Orseck said, in effect, and we can leave it to the Court --

THE COURT: He didn't say $175. He said, "approximately $175," and he had earlier said, "$150, $175."

MR. COLIN: Mr. Orseck, after the "approximately," said that we could leave the mathematics to the

Court and the jury.

THE COURT: That's a matter of argument.

MR. COLIN: I think it is a matter of cross-examination, sir. I think there is a prima facie basis for the preparation of the chart, and assuming its correctness, I think it is entitled to be marked in evidence, and then, again, it can be attacked in any way.

THE COURT: The chart doesn't go in evidence. The chart doesn't go in evidence unless in the discretion of the Court it is of assistance to the jury and it is a fair extension of the very testimony upon which it is based. I am troubled by that testimony. I have said that now for about six or seven minutes, and you have given me no new input to change my thinking from being troubled to being certain. I want to consider that. That's what I have been saying to you for five or six minutes. Mr. Colin, you don't give me anything new, so there is no point in continuing to argue.

MR. COLIN: You indicated before the recess that the $175 was your recollection.

THE COURT: My recollection was that the $50 applied to the bungalows, to the one-room units. I turned out to be in error. But I am troubled now by another phase of the chart.

MR. COLIN: After the $175 figure, or approximately $175 figure given by the witness, Mr. Orseck made a remark which I think is a clear acceptance of that figure when he said that we can leave the mathematics to the jury, and he did not, in his own examination further refine that figure. That was the last figure that he elicited. I think it is a proper premise for the preparation of this chart.

THE COURT: I understand. I reserve decision on it.

MR. COLIN: Your Honor, I cannot go further now. I would like to try to retabulate on the basis of $150. I don't know quite how to go at it, to see what it comes out to. I cannot go forward because the only reason for calling him --

THE COURT: I understand. If the chart is admissible based on this I have no question as to the accuracy of Mr. Liddle's workup based on the figure of $175. The foundation is laid. I don't need any further foundation. T he chart becomes admissible in the exercise of discretion and the foundation is there to admit it. If it is not, nothing Mr. Liddle can say is going to assist or make it move forward one bit. I don't need Mr. Liddle to tell me that. I will accept your representation on that.

MR. COLIN: When will your Honor rule on it?

THE COURT: When I am comfortable in my own mind that this fairly presents this issue to the jury without any distortion.

MR. COLIN: At the end of our proof, of course.

THE COURT: I still have time.

(In open court.)

THE COURT: I take it, subject to this one exhibit, that is the defendant Cities Service case?

MR. COLIN: It is, sir.

THE COURT: Mr. Liddle, you are excused.

(Witness excused.)

THE COURT: At this point, ladies and gentlemen, I will have to deal with certain matters in law, so you will have to excuse me for a couple of minutes.

(Jury excused.)

THE COURT: Mr. Grubbs, you have been waiting a number of days to make this motion, including a copy of ALR this morning. This is in response to Mr. Colin giving me Levine and progeny in the New York State Court of Appeals, correct?

MR. GRUBBS: Yes, your Honor.

I respectfully submit that I would like to put on the record the full basis of my motion and the factual basis on which it is based in this trial and the law both as

to indemnity --

THE COURT: Before I allow you to make your statement -- and I don't want to deprive you of it -- you are like an actor that has been ready to go on opening night for several days and you haven't worked out, but let me put the question to your adversary:

Why, Mr. Colin, is Monticello in this case given McLean v. LPW Realty Corp. in the Second Circuit, 1974, at 507 Fed. 2nd 1032 ?

MR. COLIN: I'm not familiar with the case. May I see it, please?

(Pause.)

MR. COLIN: I am familiar with this case, your Honor. I will do my best to answer your question, sir.

This was a case in which Beaman Corporation was hired by Gulf to do certain work on a service station sublet by Gulf to a station operator.

THE COURT: Named James, and Gulf sought to recover from James on indemnity which, I take it, is not different in substance than ours; the Court of Appeals said no, given general obligations law.

MR. COLIN: The Court of Appeals said -- and this is at paragraph No. 2: In this court Gulf and Beaman argue that this rejection of Gulf's claim was error. We

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2 doubt that Beaman has standing to raise this issue at all.

3 I think that that is a proper observation since

4 Beaman was not privy to the arrangements between Gulf and

5 James, and Gulf's appeal has been dismissed for failure

6 to prosecute. Therefore there was not before the Court

7 of Appeals in this case, as stated here, the question on

8 which they made the obser vation that the clause is unen-

9 forceable. It is obiter dictum on the face of the decision.

10 However, dealing squarely with the question, the General

11 Obligation Law, Section 5-321, in substance, states that an

12 agreement whereby a landlord is exonerated from liability

13 is not enforceable. That is all the statute says. It does

14 not deal with indemnification between tenant and landlord

15 but merely the exemption from liability of the landlord in

16 relation to the tenant. Without trying to second-guess

17 the public policy that is expressed in that statute, it

18 suffices, I think, to observe that in this case we do not

19 have any claim by Cities Service that it is exonerated from

20 any liability for its own acts vis-a-vis MGO or Monticello.

21 We have a claim by Cities Service here that by contract,

22 by the provision of the lease -- I think it is paragraph 9,

23 if my memory serves me -- Monticello undertook to defend,

24 indemnify and hold harmless Cities Service from any liabi-

25 lity arising out of acts and events on the premises, and that

paragraph has to be read and understood and evaluated in terms of the fact that the premises were turned over to MGO, Monticello, and the acts and events that are the subject of the indemnity, or, indeed, the omissions as well, would be those chargeable to Monticello, MGO.

So my answer to your Honor's question --

THE COURT: You are one level away from where it cuts in. In this case the plaintiff is going to prevail only on the theory that either Cities Service was negligent or committed a trespass, or it has performed acts which entitle her to punitive damages. You only can recover here against the third party on the theory that in some way the third party is liable to reimburse you if you are found to be negligent or have trespassed against the plaintiff, or have been wilfully misconducting yourself against the plaintiff.

That's a much different thing. We are only dealing with Cities Service's acts and whether MGO has a responsibility to reimburse Cities Service. If the jury would find that Cities Service did things that caused harm to somebody else, can Cities Service go to MGO and say, "You have to pay me for the harm that was done to a plaintiff"?

MR. COLIN: Assuming such a finding, your Honor --

THE COURT: It has to be. That's the only thing that is open to this jury.

MR. COLIN: I think that finding could only be predicated on a vicarious liability charged in this court to Cities Service on the basis of what had been done or not done by MGO and on the extension of those acts or omissions to Cities Service by reason of its ownership or other vicarious relationship to those acts and events.

I think that my original distinguishing remarks are valid.

THE COURT: What you are saying is that if the jury were to find that you had a duty of supervision which you breached, and MGO was in fact the one who spilled the oil but you were negligent in failing to supervise and they were in effect your agents for that purpose --

MR. COLIN: That would be one set of circumstances that would fall into a pattern.

THE COURT: You would have a right to be reimbursed to the extent it was their acts that spilled the oil, even though it was your acts that the jury found predicated liability on which was a failure to properly oversee the entire project.

You may have a point there.

Have you encompassed everything now so I am

fully in possession of your theory?

MR. COLIN: I would say also, your Honor, that insofar as a claim in trespass is asserted, that it necessarily must involve an affirmative, willful, intentional conduct, and that could only be the conduct of Monticello, MGO, and the same goes for nuisance.

THE COURT: One of the problems that one has in assesssing this case and in trying to fashion a charge is that that ain't necessarily so.

In any event, the documents that the plaintiff has put in here are replete with Mr. Langbein saying, "We have to do this; we have to do that; we are liable if something doesn't happen; we must undertake to do this; we are facing liability by continued operation."

This throws the whole ball of wax into the jury box.

#28 MR. COLIN: I don't think those subjective judgment evaluations are the bases of liability.

THE COURT: I think they are. I think they are. Let's assume for present purposes that I am correct in that because that's the way I am going to charge the jury. The jury is entitled to read your client's letters as meaning what they say.

MR. COLIN: However, I think that still leaves us with a record that makes it quite clear that the acts and omissions that lead to the oil spillage or release that is charged are those of MGO, Monticello, and that at most, as your Honor stated, there could be charged to Cities Service a failure to oversee or intervene and an omission to do those things.

THE COURT: That's your case in this regard?

I want to give Mr. Grubbs full opportunity to say to me why he should be out, and I want both of us to be sure that we understand the full length and breadth of what your case is. I don't want you later on to come in and say, "I have something else."

MR. COLIN: I have not heard Mr. Grubbs' argument. Your Honor asked me to interpret or react to the case of McLean vs. LPW.

THE COURT: Two or three minutes ago I asked you whether it was the entirety of your case.

MR. COLIN: We have adduced authorities and we will, I think, adduce further authorities to your Honor.

THE COURT: You have adduced Levine. That's the essence of it.

MR. COLIN: We think Levine is correct.

We also have, of course, in addition --

THE COURT: Do you think I ought to let the jury go for the day? We will be fifteen or twenty minutes.

MR. COLIN: I think we will have a good deal to talk about.

THE COURT: I have to leave the Court Building at twenty minutes past three.

Mr. Clerk, excuse the jury until ten o'clock in the morning.

MR. ORSECK: Your Honor, I have that picture coming down so that I am going to need two minutes of proof tomorrow morning.

THE COURT: There is no problem. I understand. I assume you will put on a witness to identify that as the stumpy bottom.

MR. ORSECK: I sure will.

MR. COLIN: We also have a small amount of proof. We served a man on MGO, Monticello, the defendant indemnified, and I would like --

THE COURT: Does that affect this motion?

MR. COLIN: I don't think so, but since Mr. Orseck mentioned the need to put in some proof I thought it appropriate to make the same observation.

THE COURT: So we are perfectly clear, what I am asking you to tell me at this point is every reason

you want to urge upon me why Monticello is in this case on the proof you have adduced.

MR. COLIN: I think Monticello is in this case not only under its contractual indemnification, but also under its common-law obligation to Cities Service based on the circumstances established in the record that Monticello, MGO, was the active party in respect of all events, was in control and the operator of the oil plant, and that Cities Service if held liable by some vicarious basis of liability would have a common-law claim, and I think that Dole v. Dow expresses just that.

THE COURT: That's it?

MR. COLIN: That summarizes our position.

MR. GRUBBS: If your Honor please, I would like to address myself to dismissing the third party complaint of Cities Service Oil Company, and I will address myself to each of the contentions made by counsel.

At the outset, I think there is no question that the plaintiff's complaint directed at Cities Service and only at Cities Service, and they're endeavoring to hold Cities Service for violation of its own duties, and they have in addition set forth causes of action not only of nuisance and trespass but because of the deliberate acts of the Cities Service Company itself, and because of the

acts performed by Cities Service Company after the premises had been abandoned, and finally because of Cities Service' own failure to carry out the terms of their agreement that they had undertaken in open court; obviously none of those causes of action could possibly be a base for indemnification under any theory.

The complaint, the third-party complaint itself, is found in one and only one cause of action, and that is the only cause of action we have been required to answer. That is by written agreement through leases there was an indemnity agreement between the parties and as a result of that indemnity agreement my client must indemnify Cities Service in this case.

So far as this particular provision of the lease is concerned, I call your Honor's attention to paragraph eight.

Now I ask your Honor to compare that provision with the provision of what used to be Section 234 of the Real Property Law, which is now reenacted into law as Section 5-321 of the General Obligations Law.

(Pause.)

So, your Honor, the public policy of the New York Legislature has been expressly put into a statute, and it was originally enacted back in 1973, and the fact that

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2 that is the declared policy of this legislature reenacted

3 in 1964 in the General Obligations Law.

4 To say that this alleged indemnity agreement

5 has any validity and is enforcible with the third party

6 plaintiff has to fly into the face of many New York cases,

7 including decisions by the New York Supreme Court.

8 THE COURT: I suppose you and I both specu-

9 late, but why did Levine act as if it never existed?

10 MR. GRUBBS: That has been recognized, I guess,

11 because we are operating in an adversary proceeding, and if

12 one party or the other party doesn't set forth the grounds

13 on which it relies the Court will not consider the contro-

14 versy only on the issues presented to it by the parties,

15 and in the Levine case neither party at any time raised the

16 issue of unenforcibility of that clause. This has been

17 recognized generally by the Court, not only by the United

18 States Court of Appeals but by the Appellate Division of

19 this Department in Reading v. Gulf Oil Corporation.

20 THE COURT: I saw that. I read Reading and

21 I think it is incredible to me that with all the lawyers --

22 and former Judge Desmond was on that case as a counsel --

23 with all the law clerks in Albany, and seven judges in

24 Albany, nobody said, "Hey, what about this?"

25 MR. GRUBBS: If your Honor please, I have had

matters in trial, and if no proper exception is made the Court won't even consider the objection, however valid it may have been. In other words, under our system of jurisprudence if one party or another doesn't stand on a contention or raise an issue the Court will not consider the issue ordinarily.

THE COURT: The United States courts operate somewhat differently in that regard. That's apparently what happened here.

MR. GRUBBS: In the Reading case they tried to answer your question.

THE COURT: I see that.

MR. GRUBBS: I believe that the United States Court of Appeals in the Second Circuit also --

THE COURT: They pointed out the same fact.

MR. GRUBBS: Yes.

If I might show some of the large number of decisions both by the Court of Appeals and lesser courts that whenever such agreement upon which Cities Service relies is brought up, they have declared it null and void for all purposes:

First, International Underwood Corporation v. Brooklyn Trust Company 287 N.Y. 589, the landlord was sued for certain defective premises and he pleaded a provision

similar to this. The Court of Appeals unanimously affirmed the trial court and said that that provision in the lease was null and void.

In Billy Knitwear Inc. v. New York Life Insurance Company, 288 N.Y. 682, the New York Court of Appeals again gave effect to Section 234 of the Real Property Law and held that it was valid effectively and was not unconstitutional.

There, again, the landlord was dealing with respect to a defective plumbing situation, and the court ruled that this provision in the lease was void and unenforcible.

In Elizabeth Jones v. Railroad Federal Savings & Loan Association 264 Appellate Division 725, the landlord again tried to rely on such a provision in the lease, and the Appellate Division, Second Department, unanimously held that the clause in the lease was void.

Then there was an oil case, C. B. Bullock v. Sinclair Refining Company, 164 N.Y.S. 2d 452. There the Sinclair Refining Company tried to set up such a clause as a basis for a counterclaim, and the Court held that the said hold-harmless provision in the lease was invalid under Section 234 of the Real Property Law, and that they would not provide the bases either of a defense or as a basis for

a counterclaim.

This very subject has been ably annotated in 49 American Law Reports, 3rd, stating at 321, and in that annotation it reviews all of the New York law on that very subject, and it sets forth that in New York State by virtue of statute provisions a real estate lease exempting a landlord from liability damages has been held void, unenforcible, as against public policy.

Then it goes on to answer the very question that Mr. Colin raised: whether or not it included both passive and active situations, and the annotation says: It has been said that the language of this statute resolves any possible doubt as to the public policy of New York in regard to exculpatory clauses, and that such language was meant to apply even to cases involving passive negligence since the statute makes no distinction between active and passive negligence and the courts will not read such a limitation into it by judicial interpretation.

They have three citations on that point. One of them is International Underwear Corporation v. Brooklyn Trust Company 287 N.Y. 589, 38 N.E. 2d 386.

The second case was Bullock v. Sinclair Refining Company 164 N.Y.S. 2d 452.

The third case on that very issue is Plankar v.

Edward Property.

The annotation goes on to point out this legislation has been held to be constitutional and not to be repugnant to the due process and equal protection clauses of Federal or State Constitutions.

Then the annotation goes forward to show the following cases in an application of this statute, the particular circumstances of refusal to give effect to an immunity provision exempting the landlord from liability, and there follows at least fifteen to twenty additional cases.

More recently, the Reading v. Gulf Oil Company case, the case again stated that any such provision in a lease would be void and unenforcible, and the most authoritative of all decisions is the December, 1974 decision of the United States Court of Appeals of the Second Circuit in the opinion which you handed to Mr. Colin to answer, and there is no question that the opinion of the Court, the United States Court of Appeals of the Second Circuit, was that in any event the clause is unenforcible under New York General Obligations Law 5-321.

Now I would like to address myself to the second point raised by Mr. Colin, and that is that although the third party complaint in truth only sounds in contractual

indemnity, but since he has raised common-law indemnity I am glad to bring in the decisions that show that he would have no such cause if in fact he alleged it, which he has not.

In New York it has been long and well established that wherever a tort feasor has knowledge of a dangerous or defective condition, and where he is a landlord on his own premises and he doesn't remedy, he is barred from any common-law indemnification.

I would like to review a number of decisions on that very point.

In Harry Adler v. Tully and Dino Napoli, Inc., 300 N.Y. 662, the New York Court of Appeals unanimously held that the party who had received notice of a defective condition and attempted to obtain indemnification, the trial court denied the cause of action for indemnity and the Court of Appeals unanimously affirmed it.

I would like to point out in this case we are dealing with a party seeking indemnity who was a participant in a litigatin in which that very defective condition was litigated, and in reaching a disposition of that matter not only was the party aware of what went on in the evidence, there is no question of notice, but then they proceeded to participate in an agreement not to have it go forward, so

this decision that says notice enough is enough to bar indemnity, here we have not only notice but participation in the condition.

In another case of Elizabeth Harrington v. 65 West Corp. 2 N.Y. 2d 476, there you have a landlord that sought common-law indemnification against a painting contractor, and the Court held that since the landlord had knowledge of the dangerous condition created by the contractor and failed to eliminate it or give proper warning, the landlord had no cause of action for a common-law indemnity.

The Court of Appeals unanimously affirmed the decision of the trial judge who found that the landlord was chargeable with notice and that he had no basis for common-law indemnity against the paint contractor.

In another case --

THE COURT: Mr. Grubbs, do you need to recite all of these? I think the point is well made.

MR. GRUBBS: So I respectfully submit to the Court that here we have a third-party complaint which sounds in clear language basing itself on an indemnity agreement, that indemnity agreement is declared by the Legislature and by the courts of this State to be null and void and have no effect and not enforcible, and certainly the grounds of

the third-party complaint stated in there as being contractual indemnity must fall if the Legislature's statute and the decisions of the Court are to be followed.

Finally, if the plaintiff now seeks to claim common-law indemnification, which he didn't allege, it is barred by the decisions of law that I have submitted.

THE COURT: Mr. Colin, do you want to respond?

MR. COLIN: Yes, sir. First of all, I would move to amend our pleading to allege the common-law claim in addition to the contractual indemnification.

THE COURT: Do you have an objection to this?

MR. GRUBBS: This is not a proper time for a pleading of a third party complaint that was served in 1973; that cause of action is not valid anyway.

THE COURT: Granted.

Go ahead.

MR. COLIN: Your Honor, the Court of Appeals of this State subsequent to Levine reiterated in Margolin v. New York Life, 32 N.Y. 2d 149: As to contractual indemnity there is a different rule. It has long been recognized that a party may protect itself from losses resulting from its liability for negligence by means of an agreement to indemnity. This rule is restricted to the extent that the indemnity provisions will not be construed --

THE COURT: This was the case where there was ice formed in the pocket in the sidewalk?

MR. COLIN: Yes, sir.

THE COURT: The lessee had the duty of keeping the sidewalk clean.

Go ahead.

MR. COLIN: The point of the case, your Honor, is: We conclude that the parties clearly expressed their unequivocal intention to have the estate assume the risk of any liability whether or not New York Life was negligent. They held in this case that indemnification was valid and enforcible.

In the case of Warren v. Hudson Pulp & Paper Corp., which is at 477 Fed. 2d 229, 1973 decision of the Second Circuit Court of Appeals, it was held at page 235: It is the law of that jurisdiction -- meaning New York -- that one party to a contract may agree to indemnify another against the latter's own act of negligence where that intent is evident from the terms of the contract citing Levine v. Shell Oil.

I think the meat of the coconut in this question, your Honor, is the very clear and obvious differentiation between the statute interdiction against a party seeking to exonerate itself from its own negligence and is sought

here which is an indemnification by an agreement against liability which in this case is not an indemnification or exoneration of Cities Service from what it did vis-a-vis MGO, Monticello. I think the statute by its terms does not extend to indemnification agreements. I think the courts by their decisions have clearly perceived the difference between what the statute provides in respect of expressing a public policy against a party relieving itself of its own responsibilities and not saying anything by way of interdiction against an indemnification agreement such as is here involved and such as the courts have recently supported in the decisions that I have directed to your Honor's attention.

I know your Honor needs to leave, sir, and I don't want to encroach on your time, so I think I have said as quickly as I can what I think is responsive to the argument made by Mr. Grubbs.

THE COURT: Mr. Grubbs, do you want to take a minute and deal with the last two authorities?

MR. GRUBBS: I think the distinction is quite clear in both of these cases that Mr. Colin has brought forth. These are cases where there is a contract to perform services. The clause that we are dealing with here is a clause that is in a lease, a part of a lease, and not a

contract to perform maintenance services, not a contract to build a building. Those are contracts having to do with the performance of a service. We are dealing here with a provision in a lease of real estate which purports to do the very thing that the statute prohibits.

Now counsel Colin has restated that it does not apply in passive negligence where the party being held is passively negligent. The three cases I have previously stated were to the fact it was.

Another thing that counsel Colin has assumed, and that is that the plaintiff's cause of action here was not for the very wrongful acts of Cities Service itself and that it couldn't be further from the truth. In this case the plaintiff is making a case that Cities Service was obligated to do certain things and Cities Service itself failed to do them. In other words, they agreed to do certain things; they didn't do certain things, and the plaintiff sustained damages as a result of their failure to do things. The cause of action is not against anyone else, it is against Cities Service for Cities Service's own failure to discharge its contractual obligation after it had notice of the defective condition and had voluntarily entered into an agreement to see that those conditions were taken care of.

THE COURT: Thank you very much.

I will reserve decision.

MR. COLIN: Ten seconds.

The statute does not say anything other than Cities Service may not exonerate itself from liability for what it does to MGO. That's what the statute says cast into personal terms rather than the objective language. We are not seeking to be exonerated from anything we did to MGO.

THE COURT: But the case, dictum or not dictum, involved an effort to obtain reimbursement from a service station owner James for injury done to the employees of the third party.

MR. COLIN: It was dictum.

THE COURT: That's what the Second Circuit stated. So it is not a statute that my colleagues on the Court of Appeals could read whether or not it applied to third parties.

MR. COLIN: The reason it was never mentioned was that patently on the face of those Court of Appeals' decisions -- and I mean the State Court of Appeals -- it was never an indemnification case. It was never an exoneration case. It was an indemnification case, and everybody knew, as is obvious on its face, that an indemnification is

not interdicted by the General Obligations Law.

THE COURT: Reading was not such a case.

MR. COLIN: That was not a State Court of Appeals' case. Levine and Margolin were both State Court of Appeals' cases.

THE COURT: The Fourth Department distinguishes that.

I will see you gentlemen in the morning.

MR. ORSECK: There is no determination on the financial statement?

THE COURT: I will reserve decision on all items overnight.

(The proceedings were adjourned to January 13, 1977, at 10:00 o'clock a.m.)

- - -

DORALEE ESTATES, INC.,
vs.
CITIES SERVICE OIL CO.,
vs.
MGO CORPORATION

73 Civ. 907

January 13, 1977
10:20 a.m.

THE COURT: At this moment we have two open matters. There was a proffer of a chart, and the other is Mr. Grubbs' motion to dismiss. You have some proof to offer at some point and so does Mr. Colin.

Mr. Colin, as I ruminate on this, you are using this chart not to demonstrate in tabular form certain facts but, basically, to attack the credibility of Mr. Edison.

MR. COLIN: Not so, your Honor.

THE OCURT: What are you doing it for?

MR. COLIN: I used the chart to show the damage which can be arrived at by accepting Mr. Edison's figures as testified to, and the Doralee figures as furnished to us, and from those, merely extrapolating a damage figure.

THE COURT: Your basic position here, as revealed by a cross-examination question, is that Mr. Edison's formula of subtraction from the five 1976 average figures leads to a ridiculous result. You asked him a question,

the essence of which was: if you went back a certain period of time you would have no rental income on these properties at all?

MR. COLIN: But that's not what the chart relates to, sir. The chart merely takes the years 1973 through 1976 and applies the Edison figures as testified to without in any way challenging them or altering them, and it takes the Doralee figures as admitted to be real and actual for those periods, and then projects by simple arithmetic the damages that would be the result of taking those known factors.

THE COURT: You do not contend here, I don't believe, that Lansman, for argument's sake, was renting below Doralee in 1973?

MR. COLIN: I don't make any contention, sir, of that nature, I don't think --

THE COURT: That's what the chart purports to show.

MR. COLIN: This chart does not show any contention of mine. This chart shows the plaintiff --

THE COURT: It purports to show that Lansman was renting underneath in the year 1973.

MR. COLIN: It shows the plaintiff's contention through the proof adduced by Mr. Edison. He said he

assumes --

THE COURT: What is it the defendant contends from this chart?

MR. COLIN: The defendant contends that from this chart there results the amount of damages shown. If we assume that the plaintiff's proof is valid and to be accepted --

THE COURT: You don't really accept Mr. Edison's proof in this regard, do you?

MR. COLIN: In any lawsuit one party is at issue with the other as to the acceptability of proof.

THE COURT: The answer to my question is that you do not accept Mr. Edison's proof in this regard.

MR. COLIN: I do not, but the chart assumes the correctness of Mr. Edison's proof and says, in effect, that if you assume Mr. Edison's proof to be correct, and if you assume the Doralee figures furnished by the plaintiff to be correct, all you can come up with is the damage that is shown by a projection of those figures on that chart. That's what it is for, sir.

THE COURT: Given that basis for its use, and given the equivocal -- I don't mean by this misleading -- the mushiness of Mr. Edison's testimony, the fact he says approximately "$150, $175," I don't believe that it fairly presents

pgcq

to this jury the picture of the evidence to take this back and put in tabular form for this jury as if it were a fact because charts have a way of being treated by jurors as established fact. I do not believe that this chart should be admitted in evidence for the jury to consider as a factual matter. You may argue to the jury any reasonable inference that you wish from Mr. Edison's testimony. You may argue, indeed, to the jury the very conclusions that this chart draws; but I am not going to allow the chart to go in evidence as establishing what you asserted is establishing, because I don't believe the record warrants it, and I don't believe the jury should have before it a chart which they could misconstrue to be an actual presentation of rents in 1973.

MR. COLIN: The chart, I think, indisputably, sir, is a presentation of what the plaintiff claimed, and if the plaintiff claimed it, and if we project their claim arithmetically to a numerical conclusion, I think it is proper to show the jury what conclusion eventuates.

THE COURT: He did not plant himself firmly on $175. He said, "$150, $175." He said approximately $175. I personally,although my personal feelings have no place in this, feel that Mr. Edison may have been a little relaxed about his testimony with regard to these deductions.

The testimony was very sketchy. Nobody chose to follow it up. Mr. Orseck did not pin it down. You did not pin it down. Therefore, I don't believe that you can give the jury, as a factual exhibit, something of this nature based upon the sketchy answers that were received.

MR. COLIN: I do not think that there is any way for the jury to arrive at numbers without the assistance of a tabulation, sir.

THE COURT: You, as counsel, may argue those numbers to them. You may even say to them, "I have added these up and this is what I get and here are the numbers," but I am not going to have a chart in this record that goes to the juryroom from which the jury could misconstrue something as being fact. It is marked in evidence. I am withdrawing it from evidence and I will have it marked for identification.

MR. COLIN: I will say in connection with Mr. Edison's testimony that we will shortly move to strike it, because I think it does notrepresent the proper measure or basis of damage. This is just incidental to the discussion, sir.

THE COURT: That's another matter.

Mr. Grubbs has moved to dismiss your claim over against his client. I grant that motion. I do not find

1 pgcg

2 that there is a common law right of indemnity here, such

3 as you speak of. The authorities that he has given me

4 with regard to the right of contractual indemnity where

5 your client is arguably a passive tort feasor, his cases,

6 bear out the fact that the general obligations law applies

7 whether or not one is active or passive as a tort feasor,

8 and the general obligations law bars the contractual claim

9 of indemnity that is embodied in the lease.

10 I might point out -- and I am sure I am carrying

11 coals to New Castle -- but to the extent there is a Dole v.

12 Dow claim as between the two of you for contribution, one

13 to the other, that was not pleaded here but remains under

14 New York law and may be pursued by you in the future should

15 the occasion for it arise and you feel so motivated.

16 MR. COLIN: Could we have the pleadings amended

17 so as to put that question --

18 THE COURT: There is no proof in the record,

19 no proof was ever offered whatsoever, which would permit

20 a juror to find what percentage is applicable to one or the

21 other. The case was not tried on that theory and no proof

22 was offered on that theory, so there is no basis to amend

23 the pleadings.

24 MR. COLIN: I think, sir, the proof already in

25 would enable the jury to determine in their own good judg-

ment the proportionate responsibility that MGO and Cities Service has for the damage found, if any.

THE COURT: I do not see any basis on this record for a jury to sensibly, other than by speculation, arrive at how you would divide the damage pie if it was required to do so. The case was not tried on that theory. No proof was offered on that theory. No witness testified to that theory.

While I have been liberal in granting amendments where the proof has been received which would support something, I am in this case not aware of any proof that would support this, even if the amendment were granted.

I deny the motion.

MR. COLIN: May I say I do not think there can be any proper or admissible proof which would attempt to quantify or draw a proportion as to the responsibility of either MGO or Cities Service. The facts as evaluated by the jury would constitute the truth out of which they would derive a proportion. I do not think any additional proof could be added to this case which would in any way be necessary to arrive at a Dole v.Dow apportionment.

THE COURT: I must disagree with you in addition to which, in reflecting upon the way the case was put in, your position from the outset, starting with the requests

to charge which were given to me to consider, have been that you absolutely no liability and that everything was MGO's fault and you are entitled to a directed verdict; there is no proof in the record whatsoever as to a suggestion that between the two of you this proportion should go to you and that proportion should go to MGO. I assume that's a tactical decision that you made in thetrial of the case.

In any event, that application is denied.

MR. COLIN: I have prepared, and I will submit to your Honor a Dole v.Dow request, and you can rule on that.

THE COURT: It is just, frankly, too blankedly blank late for me to rule on any requests that are given me this morning where you are expecting me to charge around noontime. I would not receive them because of the hour, in any event. It is inappropriate for you to offer me requests to charge at ten-thirty in the morning where I have to charge in a couple of hours.

In any event, I rule that out of this case.

MR. GRUBBS: Thank you, your Honor.

THE COURT: Off the record.

(Discussion off the record.)

THE COURT: We have some proof by somebody

at this time. I suppose the jury should be brought in.

MR. ORSECK: Your Honor, I still have one open application too, and that is the admissibility of the Cities Service' financial statement as part of the plaintiff's case.

THE COURT: That will be admitted if and when the jury says they are prepared to consider the issue of punitive damages. Under Rupert v. Sellers, 368 N.Y.S. 2d 904, a New York rule which is favored, you ask the jury whether or not they feel punitive damages are appropriate. If they indicate to me in response to a question which I will propound to them that they feel they are, then they are instructed, and proof may be taken, and they are further instructed and sent out to consider the further verdict as to what the punitive damages should be. The law of New York, preferred law of New York, seems to be it is inappropriate to put before a jury the defendant's assets when they are considering the merits of the case.

MR. ORSECK: Do I take it there would be an opportunity for further remarks by counsel to the jury? Otherwise it would be almost a flaunt of the intent of your Honor's ruling if in the summation-in-chief --

THE COURT: You may argue that you are entitled to punitive damages in your summation and the reason

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you are entitled to it; you may argue in the event they find punitive damages appropriate the Judge will further instruct them as to how they determine that issue. You may argue in that fashion.

MR. ORSECK: Fair enough.

THE COURT: Who is going to go first with the little bits of proof that are left over?

MR. COLIN: On the question of letting the jury at the time indicated by your Honor see the financial statement of the defendant Cities Service, we have authorities that that is not appropriate under New York law, and as I have indicated we have offered to stipulate that we have the capability to meet any judgment that may be rendered in this case, and I think that in light of such a proffered stipulation it would be improper and, indeed, it would be inflammatory to give the jury the financial statement of Cities Service.

THE COURT: Well, the Court in the Rupert case, which I have cited, quotes from a New Jersey authority saying the wealth of the defendant becomes material since what would amount to punishment visited upon a poor man would be a mere trifle to a man of wealth.

MR. COLIN: We have authorities squarely to the contrary of that because it is an undemocratic and, in

effect, an unfair assessment of punishment based on wealth or lack of wealth.

THE COURT: It is a question of what punishes a man of little weath may be a bagatelle to a large corporation.

I will consider your authorities, but unless--

MR. COLIN: I will present it to you, your Honor.

THE COURT: There is no question that Rupert holds what it holds.

MR. COLIN: Your Honor, I will hand you, if I may, sir, a copy of the case of Walrus Manufacturing Company v. Excel Metal Cabinet Company, 161 Fed. Sup. 840, which states: "Testimony regarding defendant's financial status and ability is not admissible in New York."

This cites a number of cases under that statement. That's at page 842, sir.

(Jury in the box.)

MR. COLIN: Your Honor, may we approach the bench? I have a question. I have a question relating to procedure.

THE COURT: Yes.

(At the side bar.)

THE COURT: I am glad you came over. I

propose to tell the jury, and I am sure you would wish this, that for reasons which are none of their concern and as to which they are not to speculate, they are no longer to have consideration of any issues as between Cities Service and MGO, and that aspect of the case is no longer --

MR. COLIN: I don't think that need be done because the case was at all times between Doralee and Cities Service.

THE COURT: Mr. Grubbs is no longer here and his party is no longer here, and in the opening statement there were remarks made about claims over, and so on.

MR. COLIN: I would ask you to say to the jury that for reasons which they need not concern themselves with Mr. Grubbs is not any longer participating in the case.

MR. ORSECK: I would like to be heard. There is an issue in this case squarely raised by Cities Service that the plaintiff corporation and officer bring ungrounded lawsuits; that they are litigation-prone.

MR. COLIN: Keep your voice down.

MR. ORSECK: You have repeatedly been saying, "Keep your voice down." I want the record to show that in no manner was it physically possible in this case for the jury to hear any word I said.

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THE COURT: Except to hear your knees creaking as you got up.

MR. ORSECK: I have been on my knees below the bar every time I open my mouth.

It is my intent, unless directed not to do so by the Court, to comment on the fact that this claim was made by Cities Service and it is part of an attempt to improperly defend their position on exaggeration or theories built out of whole cloth --

THE COURT: You may not do that. I direct you not to make that argument. They have a right to bring a claim here against a third party. I don't believe you can draw any conclusion whatsoever. The Levine case would justify their bringing it. You may not make that argument.

I do, Mr. Colin, have to state that the issues raised here in the third-party case are no longer before them because that was raised in the opening.

MR. COLIN: There has not been any proof on that. I think it would be very confusing. I think it would be prejudicial if you say it that way.

THE COURT: How?

MR. COLIN: Because I think they are being informed about something as to which they are not now presently aware of, and I think --

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THE COURT: They can look up and see that Mr. Grubbs is not here.

MR. COLIN: It would suffice to say that he is no longer participating in the trial for reasons about which they need not speculate.

THE COURT: What about your claim over against his client? They heard about that in the opening, and that is a claim which Mr. Grubbs has been defending here by cross-examination.

MR. ORSECK: There is no unique thing here. This has happened in 75 per cent of these cases. It is done the same way.

THE COURT: You get your pleas in defendant cases and defendants drop out and you point out that they are no longer before the jury.

MR. COLIN: If you state it that way, merely that Mr. Grubbs is no longer participating in the trial --

THE COURT: His party is not a party to anything they have to decide.

MR. COLIN: I would ask that you make no mention in that respect. There has been no proof adduced against him.

THE COURT: You did. You argued yesterday

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you deduced proof against him.

MR. COLIN: That I would show a claim on him to defend. I have not put it in.

THE COURT: Mr. Colin, I had assumed when I ruled yesterday that all your proof was in the record. I was going on the theory that it was all in the record.

Do you mean that the argument was in a vacuum?

MR. COLIN: No, sir. My point, very simply, is that I would want your Honor's remarks to the jury to be of such a nature as not to hurt us. That's a proper concern.

THE COURT: I understand, but the jury also has to know what it is about. It has been told at the beginning of the case that it had certain issues to decide. It has now to be told somehow those issues are no longer before it.

MR. COLIN: You will do that in your instructions the way I see it.

THE COURT: The jurors are going to say, "What happened to this case that Colin told us about in the opening where he has a claimover? What's with that case?"

MR. COLIN: I don't think that it is

1 necessary. I don't want to be tedious. The reason I
2 ask to approach is this:
3 I believe there is supposed to be some dis-
4 cussion between your Honor and counsel as to requests,
5 and --
6 THE COURT: I will send the jury back to the
7 jury room before you sum up.
8 The problem we have with your requests is
9 virtually all your requests asked for directed verdicts
10 and they were couched in those forms, and, frankly, they
11 really didn't give us a lot of guidance in how to structure
12 it.
13 MR. COLIN: I think some of them are subject
14 to that criticism, but what I wanted to say, your Honor, I
15 have already directed the Roginsky case to your Honor's
16 attention in prior argument. This is the one relating to
17 damages in the holding of the Second Circuit that proof must
18 be made of management's involvement before damages can be
19 imposed. I can give you that case and another case.
20 THE COURT: Mr. Colin, if you are going to
21 give me cases this morning --
22 MR. COLIN: I have given them to you in prior
23 argument.
24 THE COURT: If you are going to give me a
25

request to charge this morning based upon anything, I do not have time to consider it. There is not time to consider it. We have been working on this charge for a week. I worked last week two hours at home. I was up at six-thirty this morning working for an hour and a half until I took my children to school. The charges have had three and a half hours of attention, plus my law clerk's attention, and for you to come in within an hour of giving it, and say, "Judge, I want you to consider something else," I am not going to consider it.

MR. COLIN: May I say this: I had given you the Second Circuit decisions in Roginsky v. Richardson. I argued that. I quoted that.

THE COURT: You have to give me the proposed charges so they can be reviewed by my staff and by me. If I don't have them I have nothing to review. I can only review what the lawyers give me.

Let us get on with your case.

(In open court.)

THE COURT: Who is going first?

MR. ORSECK: If the defendant has rested then the plaintiff has five minutes --

THE COURT: There is some piece of proof that you said last night you wished to adduce this morning.

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MR. COLIN: In the light of this morning's developments, sir, I will not be using that proof.

THE COURT: I take it the defendant Cities Service rests at this point?

MR. COLIN: Subject to whatever additional proof the plaintiff is going to put in.

THE COURT: You are resting your case?

MR. COLIN: I am, sir.

THE COURT: Ladies and gentlemen, I want to say to you this morning at this point that for reasons that you are not to give any thought or any speculation about, and for reasons that none of you are to be concerned with, with respect to any issues, you were told at the outset of the case that you would have to decide as between Cities Service Oil Company and MGO; Monticello Gas & Oil is no longer before you for consideration. That party is no longer before the Court and the issues before you to consider as between those parties which you heard about in the opening are no longer for you to decide. Your duties here are to find facts on issues that are submitted to you. Those issues will not be submitted toyou. It is utterly of no concern to you, and shall be of no concern to you, while those issues are no longer before you.

Please proceed.

MR. ORSECK: I call Mr. Adler.

A L V I N A D L E R, called as a rebuttal witness by the plaintiff, having been previously sworn, testified as follows:

DIRECT EXAMINATION

xxx BY MR. ORSECK:

Q Good morning, Mr. Adler.

A Good morning.

Q So neither the Court nor the jury is under any misapprehension, even though I called you, you are here because the defendant hired you for an additional day; is that true?

A That's right.

Q You have in your hand -- what is the number of that exhibit?

A 79.

Q Can you tell us what the picture is?

A It depicts a chain link fence in the foreground and immediately behind it is a dock. The area behind that indicates a lake bottom and a wooded area beyond that.

Q Do you know which lake it is?

A I have been told it is the Doralee Lake. I have never seen the lake bottom personally without the photograph.

THE COURT: Do you offer it in evidence?

MR. ORSECK: Yes.

THE COURT: Is there any objection?

MR. COLIN: None, sir.

xxx (Plaintiff's Exhibit 79 received in evidence.)

Q Yesterday you were on cross-examination and I asked you to assume -- I think I used the words "hundreds of stumps," didn't I?

A Yes.

Q The questions I put to you don't have to be based on an assumption. You don't doubt that the stumps there are in the hundreds, do you?

A No, I don't.

Q Would you tell us whether or not, on the basis of that picture you would say a fair and reasonable value in the cost of scraping out and removing six inches of bottom of that lake, I think you said $2100 or $1400?

A I think about $2500.

Q Is it fair to say that had you seen that picture beforehand your testimony would have been substantially different?

A Yes.

MR. ORSECK: I have no further questions.

May I ask that this picture be shown to the jury?

THE COURT: Yes.

(Pause.)

CROSS-EXAMINATION

xxx BY MR. COLIN:

Q Mr. Adler, you testified yesterday that you would use a bulldozer machine to remove the bottom of the lake; is that correct?

MR. ORSECK: Objection, your Honor. The testimony was a rubber-wheeled machine, and I think that common conceptions that all of us have as lay people is that a bulldozer has a track, and I object on that basis.

THE COURT: There is no foundation for this. Why don't you ask what he said yesterday.

Q What form of machine did you include in your procedures for removing the lake bed, Mr. Adler?

A In my testimony yesterday --

Q Just answer the question.

MR. ORSECK: This is his own witness and he is cutting him off.

Q Answer it your own way.

A May I have the question read back?

Q (Record read.)

A Rubber-tired loader.

Q Will you describe that machine and how it

functions?

MR. ORSECK: Your Honor, this is not proper--

THE COURT: Let's proceed.

A What I had originally figured was a rubber-wheeled machine, not knowing -- I had some ideas of what I was going to find on the bottom based on looking at soil maps, and I figured that I would use a rubber-tired machine of bett er traction in the event it was a little softer, to pile the material that I wanted to take out in piles, let it drain, and then load it on to trucks and remove it.

Q Will you describe the machine, what part of the machine, what aspect of the machine, does what given work in removing the material?

#30 A The front of the machine has a rather large bucket which would be in the neighborhood of four or five yards of earth if you raised the bucket up into the air. It is on four wheels, four rubber, large rubber tires with a large bucket in the front that articulates upward. It would be a scoop effect.

Q How wide is the bucket of the machine that you have in mind to use for this work?

A Approximately eight feet wide.

Q That is wider, or about as wide, as the front face of the judge's bench? Is that about eight feet?

A This one right here, yes.

Q Would that machine be usable if there were present the tree stumps that you observed on this photograph marked Plaintiff's Exhibit 79?

A Yes.

Q What would be the process of using the machine for the removal of those stumps, sir?

A You will go to each stump individually and push it up out of the ground where it was originally set.

Q With the pressure and lifting action of the machine, would that remove the stump?

A It should.

Q Did you in making your estimate of $2500 for the job yesterday have in mind removing any stumps, sir?

A No, I did not.

Q You have seen a picture that shows you the stumps; is that right?

A Yes, sir.

Q Would that require a revision of your cost estimate, sir?

A It would.

Q Would you tell us what would be your revised cost estimate in light of the conditions that you observed on this Exhibit 79?

A If I were bidding the job I would double the price of what I gave you yesterday.

Q From $2500 to --

A $5,000.

Q Would that include removing the stumps?

A Yes, sir.

Q As well as the earth?

A Yes, it would.

MR. COLIN: That's all I have, sir.

REDIRECT EXAMINATION

xxx BY MR. ORSECK:

Q Mr. Adler, isn't it true that you would not bid this job nohow without going out there and looking at those stumps?

MR. COLIN: That is objected to.

THE COURT: Overruled.

Q If it was your pocketbook involved --

MR. COLIN: Your Honor, this --

THE COURT: Overruled.

A It depends. It would depend upon the circumstances.

MR. ORSECK: That's a good enough answer for me.

RECROSS EXAMINATION

xxx BY MR. COLIN:

Q Would you bid any job without looking the job over?

A Again, it depends on circumstances and the information that I have.

Q Did you make your estimate in testifying in this case on the basis of the information you had, including the photograph?

A Yes.

MR. COLIN: May I approach the bench briefly, your Honor?

THE COURT: All right.

(At the side bar.)

MR. COLIN: Your Honor, I am informed that a witness who worked on clearing stumps from the bed of this lake is on the way down and should be here in fifteen minutes. I would like to put him on because we will be able to put in proof of actually observed conditions and what he did in respect to moving the stumps, the method he used, which was to bulldoze it out in the method described by Mr. Adler.

MR. ORSECK: You are not attempting to tell the Judge that those stumps had been removed, are you?

MR. COLIN: I am telling the Judge I have a witness on the way who should be here in fifteen minutes

who will testify to the effect that I have just stated.

MR. ORSECK: Am I entitled to an answer to my question?

MR. COLIN: He was found only last night when the question of the stumps was first --

THE COURT: Mr. Golden, read back the beginning of Mr. Colin's statement.

(Record read.)

THE COURT: The answer to that is yes. Mr. Colin contends it was from this lake.

Let's see what happens. You have no objection if he arrives?

MR. ORSECK: It would be legitimate proof. I don't want to foreclose. The fifteen minutes is no problem. There are a few more pictures with Mrs. Huss.

THE COURT: Very good.

(In open court.)

THE COURT: Let the record show you have given me a proposed charge at five minutes after eleven. I will give consideration to it.

MR. ORSECK: A couple of questions.

REDIRECT EXAMINATION

xxx BY MR. ORSECK:

Q Tell the jury whether or not these propositions

are so:

Number one, when truckers remove stumps you have to take the tailgates off the trucks.

MR. COLIN: Objected to.

A Or drop them, lower it down, depending upon the truck.

Q The reason is that the stump can't get underneath?

A That's right.

Q And the loading is inefficient in comparison to taking away a solid fill or gravel of muck?

A Yes.

Q Secondly, when it comes to places to dump, it is not so easy to find places to dump stumps as it is to dump solid material? That's always true too?

A Yes.

Q And at this moment you don't have any place in mind where these stumps could be dumped, do you?

A No.

MR. ORSECK: That's all, Mr. Adler.

RECROSS EXAMINATION

xxx BY MR. COLIN:

Q When you increased your estimate as you testified this morning, did you take into account in making the

revised estimate, making that increase the factors that Mr. Orseck inquired about?

A Yes, I did.

MR. COLIN: I have nothing else.

THE COURT: Thank you very much.

You are excused.

(Witness excused.)

D O R A H U S S , a witness called in rebuttal, resumed.

DIRECT EXAMINATION

xxx BY MR. ORSECK:

Q I show you Plaintiff's Exhibits 67 through 77 and ask you if they are all fair representations of different portions of your bungalow colony.

THE COURT: At what time?

Q On the respective dates on each of the photographs imprinted on the side.

A Yes.

Q As of today, do those bungalows look substantially the same?

A Yes, with some improvements.

MR. ORSECK: They are offered in evidence.

MR. COLIN: Objection, your Honor.

THE COURT: Is that your swimming pool?

THE WITNESS: Yes.

THE COURT: This is as of August, 1965?

THE WITNESS: Yes.

THE COURT: How does that compare to its appearance in 1972, 1973, 1974, 1975, and 1976?

THE WITNESS: The same.

THE COURT: Plaintiff's Exhibit 75 for identification, that's the lake frozen in winter?

THE WITNESS: Yes, sir.

THE COURT: Plaintiff's Exhibit 76 is a swing. Is that still there?

THE WITNESS: Yes.

THE COURT: It looks like it today?

THE WITNESS: Yes.

Q As a matter of fact, did Mr. Colin go down that swing himself?

MR. COLIN: Mr. Orseck, please.

MR. ORSECK: You know you did. It is a proper question. You didn't go down that swing?

THE COURT: That's to establish that's in existence.

MR. COLIN: I don't think that that is necessary.

THE COURT: Do you have an objection to this?

(Pause.)

MR. ORSECK: Incidentally, there is a question before the witness.

THE COURT: You offered the exhibits in evidence.

MR. COLIN: Your Honor, I object to the admission of these in evidence. These are photos taken in 1965 and 1966, and the property is obviously considerably older and with a presumptive change of condition in the years that have elapsed.

THE COURT: Strike out "presumptive change of condition." The witness has testified that that's the way it looks today, I believe she said, with some improvement. That's the basis for the offer.

Do you contend that that is not an adequate basis in law for the offer permitting you to cross-examine at a later point if you wish?

MR. COLIN: My position, sir, is, first, that this is improper proof. This material was in the possession of the plaintiff and could have been adduced in the earlier stages of the trial; second, as I stated, the photos were taken many years before the relevant dates to which this case relates.

THE COURT: Given the testimony adduced from

Mr. Rieber I would admit these photographs in evidence.

The objection is overruled.

Q Do you have any picture in your hand?

A Yes.

Q What number is that?

A 81-D.

Q What does that show?

A That's the inside of the playhouse during the color war in the day camp.

Q Is it at your premises?

A Yes.

Q Regardless of when it was taken, does it look substantially the same today?

MR. COLIN: Objected to.

THE COURT: Overruled.

A Yes, with a little improvement.

Q Did you have a day camp when that was taken?

A Yes.

Q Doyou have a day camp every year up to the present?

A Yes.

MR. ORSECK: I offer it in evidence.

MR. COLIN: I object to the last question.

THE COURT: Overruled.

(Plaintiff's Exhibits 67 through 79 received in evidence.)

xxx

MR. COLIN: I make the same objection as I made previously. This photo is dated September, 1967.

Further, I think the representation on this photo is not a representation of any significant physical part of the plaintiff's premises but rather of an event depicted in a small area -- in fact, so small I think as not to reflect the entire structure.

THE COURT: One can see the wood paneling and the stage, and I take it it is being offered to show the interior of the construction of the building. This is Plaintiff's Exhibit 80, ladies and gentlemen. It is to be received for that purpose. It goes to the quality of the building and not to the event that is depicted.

Overruled.

Q Do you belong to the Sullivan County Bungalow Association?

A Yes.

MR. COLIN: I object to that.

MR. ORSECK: It is a preliminary question.

THE COURT: I understand. I am trying to consider what Mr. Colin might be getting at.

What is the basis forthe objection?

MR. COLIN: The objection is that I think that Mrs. Huss's membership in any organization would not be relevant in this case.

THE COURT: We will see whether this is not going somewhere.

A I am.

Q To your knowledge, did the other bungalow colonies whose names have been mentioned here also belong to the association?

A Yes.

MR. COLIN: That is objected to.

THE COURT: Overruled.

Q Do each one of the bungalow colonies file with the bungalow association a card listing and setting forth a description of their respective places?

A Yes.

MR. COLIN: That is objected to.

THE COURT: Overruled.

Q Do you know of your own knowledge that the bungalow association has cards for all of its members?

A Yes.

MR. COLIN: That is objected to.

THE COURT: Overruled.

Q Did you file such a card?

A Yes.

MR. COLIN: That is objected to.

THE COURT: Overruled.

Q Do you have that card in your hand?

A I do.

Q I am not talking about the exact one but a duplicate. Has that been on file from 1966 right up to the present?

A Yes.

MR. COLIN: Objection.

THE COURT: Let me see the card.

(Pause.)

MR. ORSECK: Your Honor, there is a clear basis --

THE COURT: Just a moment.

(Pause.)

(Plaintiff's Exhibit 80 received in evidence.)

THE COURT: That objection is overruled.

Q Does that card accurately list activities and facilities available at your place?

MR. COLIN: That is objected to.

THE COURT: Overruled.

A Except for the horseback riding which we no longer have right now.

MR. ORSECK: On that qualification I offer the card in evidence.

MR. COLIN: It is not the way to prove the facts, your Honor, and I object to the admission of the card.

THE COURT: Come to the side bar.

(At the side bar.)

THE COURT: It seems to me that substantial effort was made through Mr. Rieber to endeavor to show that this was a fifth-rate, dilapidated, rundown bungalow colony compared to others in the community; that it had poor services; that it had less services than others that Mr. Edison testified were comparable, and an effort was made to denigrate the colony. It seems to me the fact that she has had the services listed on that card, that is a fact that is admissible to show what has been in fact the services available for all of this period, except she says for horseback riding; the jury may consider in assessing Mr. Rieber's testimony as against Mrs. Huss's testimony. It is true that the card being filed with an association is less direct evidence, but, nevertheless, it is proof that she has put that card on file each year or left it on file each year. That is some evidence to support the fact that she has had those services available and has so

represented them to the public over the years in question.

On that basis I overrule the objection.

MR. COLIN: Your Honor, I have two objections to this card.

Number one, it is self-serving and it is not proof of the facts printed on its face. The card is merely the plaintiff's own declaration, secondary terms of something. Proof would be adduced in a different way.

Further, your Honor, I will point out that in the plaintiff's direct case they offered and had marked in evidence many photographic depictions of their premises, and I think it is improper rebuttal to merely put in additional such representations which were in their possession all along and could have been used in the plaintiff's case.

MR. ORSECK: In the plaintiff's case we wanted to show generally what the place was like so the jury could get an idea as to what the place was like. This is to meet new proof.

THE COURT: I have no problem with the admissibility of that. In addition, in regard to this card, which is Plaintiff's Exhibit 81 for identification, I think it is some evidence of the general level of quality here: that she is a member of this organization and does put this on file year after year.

MR. COLIN: This says, "Beautiful, spacious bungalows."

How can this be admissible in evidence, sir?

MR. ORSECK: It is not self-serving if it was made prior to the litigation. He can argue that sales puffing, but this was made eight years before the lawsuit was ever started. She didn't have the motive to compare the place with --

MR. COLIN: That doesn't relate to this.

THE COURT: Mr. Orseck, take out the words "modern and beautiful, spacious," and then I will have no objection to it.

MR. COLIN: You didn't permit me to use the chart which was demonstrable in relation to testimony. Now you are permitting this plaintiff to use a card which she prepared to prove facts. I think we have sort of an unbalanced situation here. I do not think the card is admissible under any terms. This is my sincere belief.

THE COURT: If you take out the words you objected to, which I will sustain, the card becomes admissible.

MR. COLIN: Supervised by an experienced teacher?

MR. ORSECK: There is nothing wrong with that.

THE COURT: We are talking about the bungalows. Take out the word "modern" and take out the words "beautiful, spacious," and let the jury draw their own conclusion from the photographs.

MR. COLIN: All facilities and activities on the premises.

Those are all meaningless words but they puff.

THE COURT: The facilities are described.

(In open court.)

BY MR. ORSECK:

Q There is a dam, is there not, that holds back water for the big lake or the upper lake at your premises? Is that right?

A Yes.

THE COURT: That's the 1-3/4-acre one that we have, the bigger of the two?

MR. ORSECK: Yes.

Q You bought the bungalow colony when?

A In 1965.

Q A couple of years later did you do anything with respect to that lake?

A Yes.

Q What year?

A About 1967.

Q What did you do?

MR. COLIN: I object to that.

THE COURT: Let's find out.

Overruled.

MR. COLIN: We are dealing with conditions subsequent to 1972.

THE COURT: I understand that.

A We added baffle boards.

Q Tell the Court and jury what baffle boards are.

A Near the spillway we constructed grooves where three different baffle boards fit in for purposes of raising the water on the lake, having it spill over towards the preserve and enlarging the entire area. Now during the period when we had a lot of rain we would take them out to contain the water.

THE COURT: You mean to let the water out.

THE WITNESS: Right, right.

There is also a valve near the spillway about ten feet down, and we have a wrench to control that thing.

Q Do you know what a high water mark is?

A Yes.

Q Tell us what it is.

MR. COLIN: I object to that.

THE COURT: Overruled.

A We put in --

Q Tell us what a high water mark is.

A As high as the water can go.

Q Where?

A Within the walls of the lake.

Q Did you observe the high water mark when you first bought the bungalow colony?

A Yes.

Q After you added the baffle boards was there a different high water mark?

A Yes.

MR. COLIN: I object to that.

THE COURT: Overruled.

Q Tell the Court and jury how far apart the two high water marks were.

A It is controlled by --

MR. COLIN: Same objection.

THE COURT: Overruled.

A It is controlled by the three baffle boards that we have. One raises it about eight inches. When we put in two it raises it about sixteen inches. The three of them bring it up over two feet, and the water spills way over towards the preserve and could enlarge the lake thirty, forty feet.

MR. COLIN: I object to that.

Q Did it enlarge it thirty or forty feet when you had the baffle boards in?

MR. COLIN: I move to strike the latter part of the answer and object to this question.

THE COURT: Overruled.

A Sometimes up to fifty or better.

MR. ORSECK: I have no further questions.

THE COURT: When you say "enlarge the lake," you mean it is fifty feet from the water's edge before you put the baffle boards in, until after you put the baffle boards in, and that is fifty feet on each side, or all the way around the perimeter?

THE WITNESS: Yes, but more so out towards the preserve area.

MR. ORSECK: I have no further questions.

CROSS-EXAMINATION

xxx BY MR. COLIN:

Q Mrs. Huss, I refer to Plaintiff's Exhibit 81 in evidence. This is the card you testified about?

A Yes.

Q When was this card prepared by you? What year?

A Every year.

Q And your card each year said what appears on

this card?

A No, except for the horseback riding.

Q When did you eliminate horseback riding?

A I'm not sure of the year. The books would reflect that. I don't remember.

Q Approximately wheat year did you eliminate horseback riding?

A 1970, 1971.

Q Did your cards after 1970 or 1971 mention or not mention horseback riding?

A I may have used the same card and crossed it out. You see a correction on the telephone number too.

Q You didn't cross out horseback riding on this card, did you?

A No. I never used this card. I had it here at home, this particular card. It was just a sample as it was drawn up.

Q After 1970 or 1971, except for horseback riding, which was mentioned on this card, is the card correct?

A Not entirely. There is no fishing there now but people still throw poles in there.

Q You listed fishing on the card?

A It is listed on there. We never removed it.

THE COURT: She said that.

MR. COLIN: Please ask counsel not to interrupt, your Honor.

THE COURT: Counsel was appropriate in rising.

Q Do you have boating on your lake?

A No.

Q So the card is incorrect in listing boating, is it?

A I kept hoping that things would be corrected and we would have it.

MR. COLIN: I move to strike that.

THE COURT: Strike it.

Today there is no boating?

THE WITNESS: No.

Q So on this card you had horseback riding which is not there, and fishing which is not there, correct?

THE COURT: This is repetitious. I see no point in getting into this.

Sustained.

Q Mrs. Huss, I refer to Plaintiff's Exhibit 79, which isthe picture of the drained lake with the stumps. I ask you whether the Village of Monticello or contractors for the Village of Monticello worked on the bed of the drained lake.

A The Village of Monticello and Town of Thompson had to get permission from the State of New York to drain the lake, and they did not work on the lake but some contractor did some installation not in the lake but in an area alongside it.

Q Did the contractor work in the bed of the drained lake?

A I don't think so.

Q Did you watch the work when it was being done?

A No.

Q You don't know what was done, do you?

MR. ORSECK: Isn't that argumentative?

THE COURT: Sustained.

Q The work consisted of laying a pipeline through part of the bed of the lake, did it not?

A No.

Q What did it consist of?

A I don't know. Some technical work.

MR. COLIN: I have nothing further to ask of this witness.

MR. ORSECK: The plaintiff rests, your Honor.

THE COURT: Very good.

(Witness excused.)

MR. COLIN: Your Honor, may I have a brief

moment to talk with the person I mentioned before?

THE COURT: You may.

MR. ORSECK: While that is happening may I exhibit the exhibits to the jury?

THE COURT: You may.

(Pause.)

MR. ORSECK: May the record indicate that this recess so far has been ten minutes.

THE COURT: Counsel, are we ready?

MR. COLIN: I call Mr. Sedleck.

J A M E S S E D L E C K, called as a witness by the defendant Cities Service Oil Co., in rebuttal, having been first duly sworn, testified as follows:

THE COURT: Ladies and gentlemen, this witness is being called on behalf of Cities Service in this case.

DIRECT EXAMINATION

xxx BY MR. COLIN:

Q Mr. Sedleck, where do you live?

A Liberty.

Q Is that in Sullivan County?

A Yes.

Q How long have you lived there?

A Thirty-five years.

Q What kind of work do you do?

A I am a laborer, a union laborer, Local 7.

Q Have you ever been on the premises of the Doralee Bungalow Colony?

A Yes, sir.

Q In what year were you there?

A 1972 or 1973.

Q What were the circumstances that brought you there?

A There was a sewer line being put there for the Village of Monticello.

Q What involvement, if any, did you have in putting through that sewer line?

A Pardon me?

Q What was your connection with putting in that line?

A I was laying pipe.

Q For whom were you working?

A S&S Construction, Fallsburg.

Q Were you there at the time the lake was drained, sir?

A Yes, sir.

Q When was that?

A 1972, the fall, somewhere in there. I'm not sure.

Q What if anything did you observe in respect of fish in the lake?

A There was a lot of fish.

Q What kind of fish?

A Pickerel, bullheads.

Q Did you yourself take any fish from that lake?

A Yes, sir.

Q What kind of fish did you take?

A Pickerel.

Q How large?

A Two foot, eighteen inches.

Q Did you see any fish other than the ones you took?

A I don't know what you mean.

Q Did you see any fish swimming in the lake or emerging --

A A lot of them went downstream through the pipe, out the outlet, on down.

Q What was the quantity of fish that you took out of the lake for yourself?

A There was about three of us that took them. I would say thirty, thirty-five fish. That's all we took. The rest we left. They went down.

Q Did you see the bed of the lake after it was

drained?

A Yes.

Q What did it look like?

A The top was mucky and the bottom was hard. It was a hard surface underneath.

Q What was the appearance of the muck?

A Just like regular muck, mucky.

Q Was there any oil observed by you when you looked at the muck?

A No, sir.

Q Did you see any tree stumps on the lake?

A Yes, quite a few.

Q Did you observe anything in respect of the removal of the tree stumps?

A Yes. They had a D-8.

Q Tell me in your own words. Go ahead.

A They had a dozer in there, the company I worked for, a D-8.

Q What did they do?

A One side, they pushed them out.

Q Was there any difficulty observed by you in that process of removing the stumps?

A No.

Q How did the dozer do it? Describe how it

proceeded and what happened when it did whatever it did.

A Whatever muck and stumps, you just pushed them right out. It is small, you know.

Q The stumps were small?

A Yes.

Q Have you ever met me before?

A No, sir.

Q Before today?

A No, sir.

MR. COLIN: You may examine.

CROSS-EXAMINATION

xxx BY MR. ORSECK:

Q Do you know me?

A I have seen you around Liberty.

Q The pipe didn't go through the lake bed, did it?

A No. On the one end it was pretty close.

Q When is the first time you learned you were going to be a witness in this case?

A About 6:30 this morning.

Q Had you ever spoken to anybody about the case before?

A No, sir.

Q Who called you at 6:30 this morning?

MR. COLIN: I object to that.

THE COURT: Overruled.

A The man in the back.

Q Which one? Mr. Baum?

A Yes.

Q Do you know him?

A No, I don't.

Q Did he tell you where he got your name from?

A Yes, he did.

#31 Q Whom did he say he got your name from?

A Henry Bryant.

Q Who is Henry Bryant?

A He is the man I work for -- he was my foreman there.

Q Did Mr. Baum tell you he was one of the attorneys for Monticello Gas & Oil?

A Yes.

Q You came down here yourself about forty-five minutes ago or something.

I noticed that during the recess Mr. Colin was asking you questions and you kept shaking your head as if to say, "No, no, no." Tell us --

MR. COLIN: I object to that.

MR. ORSECK: That's good cross-examination.

THE COURT: Ladies and gentlemen, I think I will take a recess.

(Jury excused.)

THE COURT: At this time, Mr. Orseck, I would permit you to ask these questions in the absence ofthe jury.

MR. ORSECK: That's what I was going to suggest, your Honor.

Q Did that happen?

A Come back again with that.

Q During the recess, when you were talking to Mr. Colin and Mr. Adler and Mr. Baum, I noticed you were shaking your head as if to say, "No, no, no."

A Yes.

Q What was Mr. Colin saying to you when you said, "No, no, no"?

MR. COLIN: Objection, your Honor.

THE COURT: I think this is permissible.

A I don't get you.

Q During the conversation right behind that bar this gentleman to my left, Mr. Colin, was talking to you and you were shaking your head as if to say, "No, no, no" a good number of times. My question to you is this: What was said to you that evoked your response of, "No,

no, no"?

A I don't remember saying, "No, no, no." He just asked me who I worked for, when I worked there; he wanted to know if that was a picture of the lake, and he wanted to know about the fish and --what else? And about the machine working in the lake.

Q You didn't say "No" a good number of times, and shake your head back and forth? There is nothing wrong if you did.

A I might have. I might have because sometimes I do shake my head when somebody talks to me, but I go the other way, yes.

Q Did Mr. Colin suggest anything to you which you refused to testify to?

A No. He didn't suggest anything. He just asked me.

Q Some of the questions he asked you you shook your head no to?

A There was nothing really to say no about what he asked me.

MR. ORSECK: I will withdraw the offer of proof, your Honor.

THE COURT: We will take our break now anyway. Ten minutes.

(Recess.)

(In the robing room.)

THE COURT: We have a set of requests to charge and then we have an amended set. I am only going to deal with the amended plus the supplemental; is that correct?

MR. COLIN: You catch me flatfooted. Mr. Liddle will be here in a moment. I don't have them before me.

THE COURT: Your No. 1 amended is going to be given in substance.

Your No. 2 is not going to be given.

Mr. Liddle, I take it we disregard the original submission and deal only with the amended submission and the supplemental?

MR. LIDDLE: That's correct, through 14.

THE COURT: Amended No. 1 is being given in substance.

I am not going to charge in effect amended No. 2. There are several material differences from it.

I am going to charge that they may assess whether sewerage was a factor here. I will charge whether sewerage was a factor here.

I will charge No. 4. They may take into

consideration those facts, but also they may take into consideration the facts that rents were generally going up in assessing the general rent structure.

I decline to charge No. 5.

As to your request for a directed verdict, I am going to charge standards for punitive damage.

MR. COLIN: You will charge as to the standards?

THE COURT: Yes.

I am going to charge No. 6 throughout in substance, but not in that language.

I am not going to mention No. 7.

I am going to charge 8 as being one of the items of damage, and the other item of damage I am going to charge is plaintiff's claim, the cost of dredging the bottom of the lake.

The third-party claim No. 9 is out. I am not going to charge 10 because it asks for a directed verdict.

MR. COLIN: Will you charge it in substance?

THE COURT: We are charging the law of trespass, but I will not charge as you have it.

Similarly with No. 11.

I am not going to charge 12. The fact that

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2 there has been a prior lawsuit and a determination and

3 the terms of the determination are a factor that the jury

4 could find give rise to further responsibility which might

5 give rise to further damage here.

6 Now, Mr. Orseck, turning to you --

7 MR. LIDDLE: I believe we handed a No. 13

8 and a No. 14.

9 THE COURT: 13 I have not seen and 14, to

10 the extent I might give some charge in the area of puni-

11 tive damages -- I am not going to get involved at this

12 late hour, as I told you at the side bar, in considering

13 further requests to charge.

14 I don't know what 13 is. I have not seen it.

15 Mr. Orseck, do you want me to go through yours?

16 We are giving, in substance, the standard

17 charges on negligence, trespass, and nuisance. It is not

18 in your language but as I understand the law to be.

19 I am going to charge, so that you both are

20 aware of this -- I commented a number of places -- but I

21 am going to charge four different theories. Three of them

22 are the ones you have alleged are common-law theories.

23 The fourth is that if you find that Cities Service had

24 undertaken in the April 1972 agreement to correct the

25 complained-of conditions and, further, that it failed to

prevent further oil spillage, and this spillage injured plaintiff, you found that the defendant has breached this agreement and your verdict must be for plaintiff on this cause of action.

MR. COLIN: Isn't that a charge leaving the law to the jury? The agreement and its meaning, I think, is a question of law and not a question of fact.

THE COURT: No. This agreement has to be read in the light of what Mr. Green did and Mr. Langbein did or did not do.

MR. COLIN: I don't think the agreement can be read in any other light other than its own language. That's a question of law. It should not go to the jury.

THE COURT: If they had undertaken to correct it and if they failed to prevent it, that's a factual question. It has nothing to do with the agreement, and if the spillage injured the plaintiff, which is a factual issue --

MR. COLIN: Is your Honor going to charge on both trespass and nuisance that it is necessary to show intentional acts on the part of the defendant in order to find a liability of either nature, that these are intentional torts?

THE COURT: Yes. I am going to charge the jury, however, that the word "intention" in this context --

MR. ORSECK: The natural consequence of your act?

THE COURT: Those are my words.

MR. ORSECK: It was anticipation and not suggestion.

THE COURT: If you find that the defendant acted -- this has to do with interference, this is a nuisance claim -- if you find that the defendant continued causing such interference -- and as to this knowledge plaintiff points to the April 1972 settlement agreement -- your finding will be that the defendant's conduct was intentional.

MR. COLIN: It would have to be a finding of conduct on the part of Cities Service, intentional affirmative conduct.

THE COURT: Conduct can be an act or an omission.

MR. COLIN: It cannot be an omission in nuisance or trespass. Those are not torts which can be supported by omission.

THE COURT: If there is a duty here to prevent something and there is an awareness that a trespass will occur if a duty is not exercised --

MR. COLIN: It may be negligence, but not

trespass or nuisance. There is a count of negligence in this case.

THE COURT: Suppose you go back to ancient, old situations where a farmer owns a horse and leaves his gate open and the horse goes into the neighbor's land. That horse is trespassing and the owner must reasonably assume if he left his gate open the horse would stray. Isn't that trespass? I must confess I have never had a trespass case in twenty-three years of practice and three years on the bench.

MR. COLIN: I think that's negligence conceivably, but I don't think it is a trespass.

THE COURT: In any event, that's what I'm going to charge.

Mr. Orseck, do you want me to go through ruling on yours specifically? Is there any particular one you want to argue as to which you have any concern?

MR. ORSECK: Only for the purpose of guidance on the summation from page 17 on, punitive damages.

THE COURT: I am going to charge as follows on punitive damages, and I read Walrus v. Excel 161 Fed. Supp. 840, which appears to capitalize older New York law at page 82. It is a District Court case, Western District Court of New York, which I decline to follow in the light

of the case I have cited which is Appellate Division and much more recent.

This is what I will charge with respect to punitive damages: In the event you find that plaintiff is entitled to compensatory damages, you will consider the issue of punitive damages. In other words, in addition to compensatory damages you may find punitive damages. With respect to punitive damages, the law I am going to give you, Cities Service is not liable merely because you may have found that Cities Service is liable to plaintiff for compensatory damages. Punitive damages might be awarded if you find the acts of the defendant in causing or permitting the damage to plaintiff's property were wanton and reckless. Punitive damages are allowed to punish the defendant for wanton and reckless acts, and to deter others. Punitive damages might be awarded to deter this defendant from a repeitition of the wrongful act, should you so find, and to serve as a warning to others.

What is a wanton and reckless act? An act is wanton when it is done in such a manner and under such circumstances as to show utter disregard upon the right of others that may flow from the doing of the act and the manner in which it is done. In determining whether the defendant's acts were wanton or reckless, and so forth,

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you may consider whether the defendant committed or participated in an illegal act or the defendant's conduct was a constant failure to discharge a legal duty. Such conduct on the part of the defendant, if found by you, warrants the presumption of a reckless indifference to rights of others, which is the equivalent of intentional misconduct.

In determining whether or not the plaintiff is entitled to recover punitive damages, you may consider whether the defendant entered into the 1970 settlement agreement in bad faith, as plaintiff contends, and whether or not the defendant violated the stipulation made in the Supreme Court of the State of New York in April of 1972.

MR. COLIN: As to that aspect of your proposed charge, we are going to move, as soon as your Honor has reviewed the charges, to strike any proof relative to the settlement in the Supreme Court under Rule 408 of the Federal Rules of Evidence, which I think covers that. Moreover, we would say that even if we breached an agreement it will not sustain punitive damages as a matter of law.

THE COURT: In any event, that's in substance.

I have a couple of more clauses.

MR. COLIN: Would your Honor charge as well as said by the Second Circuit Court of Appeals in Roginsky v. Richardson-Merrell, that it must be found that the officers or directors constituting the management of Cities Service must have either approved or directed or ratified with knowledge what happened here?

THE COURT: That request which you submitted to me a few minutes ago I am not going to give on the ground of timeliness. I'm not sure, in any event, that it represents the law.

MR. COLIN: I reviewed that case with your Honor --

THE COURT: I understand, but you argued that with me for fifteen minutes out in the other room. Why do you do this? I have, throughout this trial, made rulings, and an hour later you would come back about it, or days later. Why do you do that to me? I have ruled on it. You told me this. You argued it. I said you didn't give me a request, and within fifteeen minutes a request was caused to appear. I don't charge something because you argue something in a motion. I told you that before. Why do you argue it again?

MR. COLIN: I'm sorry I vexed your Honor. That was not my intention.

THE COURT: This has happened a great number of times. I have a feeling that there is no finality about some of these things. I am not vexed. I just wish it didn't happen.

MR. ORSECK: Your Honor, if it would be appropriate for me to keep quiet --

THE COURT: Those are my rulings.

Is there anything more?

MR. ORSECK: I don't want to beat something to death, but I would call to your Honor's attention that this last item that your Honor is not going to consider, the documents are replete that Cities Service was in touch with its general counsel and he was aware of everything, so that even on the merits, if you were to consider it, I would vehemently object, and I don't think it belongs in the case anyway.

THE COURT: I understand.

Now you are moving to dismiss the proof of the April, 1972 settlement on the ground of Rule 408? That motion is denied.

MR. COLIN: I also move under 407 of the Federal Rules of Evidence to strike from the testimony all of the proof relating to Cities Service demolition of the former oil plant and removal of the surface soil from that

plant on the ground that it does not constitute evidence of any negligence or other actionable circumstances.

MR. ORSECK: Where control is denied subsequent repairs are always admissible. That's number one.

Number two, the essence of this lawsuit is to show that whatever they did they did late and not in accordance with the stipulation. So for at least those reasons --

THE COURT: I heard Mr. Colin arguing in his opening that among other things they abated this nuisance and got out. Was that not argued?

Anyway, be that as it may, I deny that motion.

I do think there is one other area which I probably ought to alert you to. I am not sure I have the language exactly as I am going to end up with, but the thing that puzzles me is even the charge I am giving is now undercut by the testimony of this last witness because if you credit his testimony there was no oil in the land in 1972, and yet there is oil in the land found by the Department of Conservation. If he were credited, the only source of oil to that land is the spillage after the settlement agreement in Sullivan County. I'm not getting into credibility matters, but you do have the problem of facing him off against Mr. Hudson of the State of New York.

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That's another matter.

In any event, I have in mind to charge: If you find Cities Service responsible for oil pollution causing damage to plaintiff's property by reason of the oil spill after the date of the release in 1972, it is no defense to Cities Service that some of the oil pollution on plaintiff's land was spilled before the date of the release.

As I said the other day in open court, if the jury were to find that there was damage caused by pollution, they are not going to be permitted on this record to speculate as to what percentage was what, because as I see it the burden shifts to the defendant if the defendant wishes to pick it up to show that the pollution occurred before.

If the jury finds that there was pollution that caused damage after the release, spillage that caused pollution after the release, the burden has shifted to you to demonstrate --

MR. ORSECK: So I may be guided for summation purposes, does your Honor intend to instruct the jury or to read to the jury the sections of the Environmental Conservation Law which I had furnished to the Court and also to counsel?

THE COURT: I do not. I do not.

MR. COLIN: May I note my objection to your intention on the last charge.

THE COURT: You may.

MR. ORSECK: I intend, unless otherwise directed, to refer to those statutes. It is framed in the complaint. I gave a copy --

THE COURT: I might have to do that. You may be right.

MR. ORSECK: 11-B in the complaint alleges those violations. They are listed in the requests themselves.

MR. COLIN: There are no violations against Cities Service. The only violation, the only order, was against MGO. I think it would be most erroneous to try within this case the question of a violation not filed, not determined, as though we were going to have a trial within this civil suit of a possible violation of a statute.

THE COURT: These are the sections which you have encircled?

MR. ORSECK: Yes. No others. I wish those to be charged.

THE COURT: 17-0101, 17-0105, and subdivisions 2, 5, and 6; and 17-0501.

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MR. COLIN: I think it would be highly improper to put before the jury the question of whether Cities Service Oil Company is chargeable for a violation which may only be maintained, prosecuted, and determined by the State Department of Environment.

MR. ORSECK: In punitive damages there need not ever be a criminal prosecution much less a violation for a criminal act to be considered by a jury on the issue of punitive damages.

THE COURT: I think it is appropriate to read this. On this record it would not be at all unreasonable for the jury to conclude that MGO was the fall guy for Cities Service in the hearing and fine that flowed from the hearing.

MR. COLIN: I, of course, respectfully object to that. I point out to your Honor that there is a finding against MGO in the state proceedings. I don't see any way it could be extended beyond its own limits.

THE COURT: I know, but Cities Service undertook a certain obligation here which they acknowledge in innumerable memos to take certain remedies with regard to this plant, and it was the responsibility of their plant, and MGO ends up paying the fine in a

1 situation where Cities Service says it is their respon-
2 sibility. In the entire context the jury should be aware
3 of this statute. I am not going to charge them that
4 anybody paid a fine. I will not even mention it, but
5 I think the statute should be charged to the jury. I
6 will charge it.
7 MR. COLIN: I respectfully except.
8 THE COURT: Is there anything else?
9 MR. ORSECK: I don't think I am going to
10 cross-examine this witness any more.
11 THE COURT: Then you are all through and
12 both sides have rested?
13 MR. ORSECK: Yes. Everybody has rested
14 fully.
15 MR. COLIN: I have motions.
16 THE COURT: You have motions to renew your
17 motions?
18 MR. COLIN: I have motions directed to
19 striking evidence.
20 THE COURT: I will take your summation to-
21 day and then I am going to take your adversary's summation
22 and my charge in the morning.
23 MR. COLIN: I would suggest it would be
24 fairer to take both summations the same day. I think there
25

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will be enough time.

THE COURT: I cannot do it. I have motions all afternoon. I had expected to have summations starting at, say, ten-thirty, and I would have charged at the conclusion of them. At this point I am unable to do so. I have motions all afternoon. I want to get this case to the jury early tomorrow.

MR. COLIN: May I suggest that both sides sum up tomorrow?

THE COURT: That means that I will be charging the jury after lunch on Friday, and I am not going to do that.

MR. COLIN: May I make these motions now?

THE COURT: Yes.

MR. COLIN: I move to strike, your Honor, Plaintiff's Exhibits 2 and 21, which is the water pollution case report. This, on its face, finds the polluter to be Monticello Gas & Oil Company.

As redacted --

MR. LIDDLE: It was allowed into evidence under both, 2 and 21.

MR. COLIN: It is this document, sir. The report affirmatively found Monticello Gas & Oil Company to be the polluter. The proposed redacting of the report

will strike that finding and will leave as the named party the owner Cities Service Oil Company.

THE COURT: It says "Operating: Monticello."

MR. ORSECK: Right on the first page.

MR. COLIN: But the polluter, as found by the Department, is redacted.

THE COURT: Would you rather that go back in?

MR. COLIN: I think it should be stricken.

THE COURT: It was stricken.

MR. COLIN: If you are going to admit this, then I don't think it should be redacted to strike out the identity of the polluter as found by the Department. On the first page, there is the name of the polluter.

THE COURT: Do you want it back? I have a redacted copy. You want it back in?

MR. COLIN: I think the exhibit should be stricken.

THE COURT: I deny that application.

MR. COLIN: Then I think it should not be redacted to delete the identification of the polluter.

THE COURT: Why didn't you urge that upon me when I redacted it at the time?

MR. ORSECK: I would object to it being changed on the ground that Monticello is not in the case now and

they were before. I would move that the Court affirm its earlier determination.

THE COURT: I have ruled and everybody had a chance to be heard on it. I struck that out with everybody's consent.

MR. COLIN: Not with my consent. My position was that the document was not properly in evidence.

THE COURT: Having gone beyond that you have a duty to speak up if I am going to redact something.

MR. COLIN: I did not consent to the redaction in those terms. On page 6 redaction proposes to delete the reference of the Department to their communications with Monticello Gas & Oil Company alone in respect of obtaining compliance. I think striking that is highly prejudicial to Cities Service.

THE COURT: Do we have an unredacted copy?

(Pause.)

THE COURT: I will put that back in, if you want it.

MR. ORSECK: It is my pleasure.

THE COURT: I thought given the possibility on this record the jury might deem Monticello to be under the control of Cities Service.

Then there is a statement that Cities Service

is in contempt of court in somebody's opinion.

MR. COLIN: I have not gotten that far. I was referring to page 6 which redacts out the Department's reference to their several approaches to Monticello Oil & Gas and the lack of cooperation by that party. If this document is going to remain in then that should remain in. I think it is prejudicial to Cities Service to delete the showing that Monticello is the offender and the noncomplier in relation to the Department.

Then, your Honor, I refer to the last page and, again, the proposed redacting would delete: The management of Monticello Gas & Oil has been totally uncooperative.

I think that should not be deleted from the document.

The last paragraph on the last page, page 7, I do agree that should be redacted. This was the one in which your Honor referred --

MR. ORSECK: It has been the plaintiff's position that this is a state document, and while I didn't raise too much objection when your Honor did redact certain portions under the rules, I think the whole thing is admissible. I so qualified it as a state document and it is for counsel to explain away --

THE COURT: I disagree with you. They can't be hoisted on what some state official happens to write down on a piece of paper and puts in his file.

MR. ORSECK: You see, Mr. Colin had certain objections when he had a claim against Monticello. The posture of the case is different now and what happens just as a matter of fairness is that there are two bites of the apple. It does not strike me as being right. In other words, his position is different with respect to this document deending on whether or not Monticello Gas & Oil is in the case as a third-party defendant or not at all.

MR. COLIN: It does not change it.

THE COURT: I will adhere to my original ruling. What I had in before is in and what I excluded before is out. Everybody had a chance to be fully heard.

What is the next exhibit?

I think we will excuse the jury until one-thirty. I will ask the court clerk to tell them that they will hear summations for one and a half hours and then be excused for the day.

The man on the witness stand is excused.

Now what is the next exhibit?

MR. COLIN: I wish to strike Exhibit 3, which

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is a letter from the New York State Department of Environmental Conservation addressed to Monticello Gas & Oil Company. I submit that this letter inno way binds or suggests liability on the part of Cities Service Oil Company. It is highly prejudicial.

#32 THE COURT: I admitted this because it was, in effect, past recollection recorded of events that he had observed. It went in on that basis as a factual statement of conditions at that premises.

That objection is overruled.

MR. COLIN: Are you admitting --

THE COURT: What I admitted I admitted. Why do you ask that?

MR. LIDDLE: Page 2, I believe, you admitted only as to MGO at the time the document was introduced, a portion on page 2 that begins with the number 2 in a parenthesis.

THE COURT: That's correct.

MR. LIDDLE: That should be redacted, your Honor.

THE COURT: It is, I assume.

MR. LIDDLE: It is not on their copy.

MR. ORSECK: I don't know what the nature of the objection is.

MR. COLIN: It is a direction for Monticello Gas & Oil Company to do something.

THE COURT: I marked what was in and what was out.

MR. ORSECK: I have the second page, and this was admitted when I read Mr. Kwak's testimony at some juncture of the case, some later juncture of the case.

MR. LIDDLE: Only against MGO.

MR. ORSECK: Even if your Honor admitted it against MGO there is a square issue of fact in the case as evidenced by the proof that MGO was an agent of Cities Service, and that's for the jury to determine and not for the Court to unilaterally determine.

MR. COLIN: That's a directive, your Honor. It is not factual. It is merely an order or a direction to the addressee to do something.

THE COURT: This is seven days before the same thing was embodied in a stipulation in court as to both parties.

MR. ORSECK: That's correct. It was specifically admitted when I read the author's deposition, the deposition of Mr. Kwak.

MR. LIDDLE: Only as to MGO. You don't have

the original of these exhibits. You Xeroxed them and brought the redacted --

THE COURT: I have the whole thing.

MR. COLIN: Your Honor, in respect --

THE COURT: At this point, if it is not admitted against Cities Service, I would permit the jury to consider it against Cities Service based upon the entire record.

MR. COLIN: As to Exhibit 28, sir, I object to the receipt of the exhibit with the redaction or deletion therefrom of the statement on page 2 of the exhibit identifying MGO and Monticello Gas & Oil Company as the subject and the statement that oil was present in the water on April 20th and was traced to the only known source of such contamination, the MGO Corporation, Monticello Gas & Oil Company, Inc., and deleting that, I think, is highly prejudicial to Cities Service Oil Company.

THE COURT: I don't follow you.

MR. ORSECK: There was nothing deleted.

MR. COLIN: My marking is incorrect then. I'm sorry.

I move to strike, your Honor, Exhibit 65 in evidence on the ground that it is a communication from the Department of Conservation to the plaintiff, and in stating

that a legal action against Monticello Gas & Oil Company is being prepared it necessarily has --

THE COURT: How did this get in?

MR. ORSECK: Something altogether different. Mrs. Huss wrote about the complaints of sewerage and this was to confirm Mr. Hudson's reason for appearance. He said that: "We answered, my department answered, her letter."

He came down and he put dye in the water afterwards. That was on that issue.

THE COURT: Whatever the basis, I assume I gave this consideration. I don't remember this exhibit, but I assume I gave consideration to positions of counsel at the time it was offered.

MR. ORSECK: Yes, your Honor.

Nobody spoke about the second big paragraph about currently preparing a case report. This went in in sequence with her two letters, handwritten letters, where she complained about sewerage, and this was in answer to those letters.

THE COURT: I will leave it stand. I don't remember my ruling on it, but if it is in I am sure I gave it consideration at the time.

MR. COLIN: One further motion, your Honor:

I move to strike the testimony of Mr. Edison in respect of damages premised on assumed differentiation between the Doralee rents and the rents of others, and my motion is based on the proposition that the only proof of damage in this case is the cost of repairing what is alleged to have been the injury from the pollution or restoring the land to its former condition, or the diminution in value of the premises, whichever is less.

I refer your Honor to the case of Hartshorn v. Chaddock, 135 N.Y.117, and I submit that the theory of damages reflected in Mr. Edison's testimony is not consistent with law.

THE COURT: Do you have the case there?

MR. COLIN: Yes, I do.

(Pause.)

THE COURT: This case seems to say, Mr. Colin, that it goes only to the question of whether you can seek damages for restoration or diminution of market value, and it says that both are acceptable. It does not say that lost profits are not acceptable where there is a structure that cannot be rented at full value. What in here says that that is not so?

MR. COLIN: I think the clear import of the case is to lay down those alternatives as the only rule of

damages under the circumstances here present.

THE COURT: I decline to strike Mr. Edison's testimony.

MR. COLIN: Your Honor, I think we have some problem remaining, and that is that I think your charge has to make clear that punitive damages cannot be found if the jury should find, let us say, as you intend to charge, that we did not perform an agreement embraced in the stipulation of settlement.

THE COURT: Willfully and recklessly.

MR. COLIN: I don't think as a matter of law you can find punitive damages for a contract action.

MR. ORSECK: That's so, but there is no breach of contract action here.

MR. COLIN: That would be a charge relating to a breach of an agreement, which is a breach of contract, and I would submit that it would not be appropriate to leave the possibility of punitive damages being based on that.

Similarly, I think there is a question of punitive damages being found on negligence in simple terms.

THE COURT: Do you mean to say if you make a deal where you say, "I'm going to clean up this mess so that you have no more oil damage on your land," you make an agreement for that and you settle the case, therefore

if you start just pouring the oil away on the property that that cannot be the subject of punitive --

MR. ORSECK: I have three cases where it happened just like your Honor's hypothesis. They are all out-of-state cases and they are all cited on the memorandum on punitive damages. They all hold yes, because this is not an ordinary contract. This was to avoid damage to land.

MR. COLIN: If the trespass as postulated in your last observation is proven it would support that; but it would not be competent to bring into that violation the question of whether the trespass followed an agreement between the parties.

THE COURT: Definitely, because the agreement between the parties is notice to the defendant of what the obligation is and the risks of non-performance, and defines the extent of willfulness.

MR. COLIN: I think trespass is unrelated to any such agreement.

THE COURT: Is there anything else?

MR. COLIN: Do you have in mind to give the jury questions? I have prepared a set of questions.

MR. ORSECK: May I interrupt for a moment? I think the Court would be interested.

These cases in my memorandum are all out-of-

state cases, but they all talk about an earlier violation of an earlier agreement to stop pollution, and punitive damages was awarded in each of them.

MR. COLIN: Was I furnished with a copy of that?

MR. ORSECK: You were. You replied to that.

THE COURT: I have the form in which I ask the jury to say whether they are finding for the plaintiff or the defendant on each of the four theories, and if they find for the plaintiff on any one of the four theories they are to find the amount of damage that they find flows, and they are to make a statement of whether or not they find that punitive damages are appropriate here, in which event I will instruct them that they are to return, and I will permit evidence to be put in of the defendant's net worth, and we can go forward from there.

MR. COLIN: May I hand you, marked for identification, a proposed set of jury questions for your consideration.

THE COURT: Actually, the first one I will give to them in a different fashion. I observed your proposed questions.

MR. COLIN: May it be marked for identification?

THE COURT: It may.

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(Court Exhibit 1 marked.)

MR. ORSECK: Plaintiff has repeatedly taken the position that the so-called general release really doesn't present any question for the jury. It is clearly a mistake. There is nothing in the record from which any kind of inference can be made that the stipulation of settlement made before Judge Pitt was a release of October 25. The jury will have to speculate.

I know your Honor has ruled differently, but I still press it and I genuinely can't see how that second document is anything but a mistake. It says on it this specifically --

THE COURT: Mr. Orseck, one of the questions I will ask the jury is what they find to be the date of the release here, and they will govern themselves as to how they determine that fact on the record.

MR. COLIN: May I examine your Honor's proposed set of questions to the jury so I may comment on them?

THE COURT: I will tellyou what they contain:

We, the jury, find on the cause of action with respect to nuisance for the defendant or plaintiff; similarly as to trespass; similarly as to negligence; similarly as to breach of the settlement agreement.

MR. COLIN: As to that I submit it is not

pleaded on that part of the case.

THE COURT: If the verdict is for the defendant on all causes of action disregard the following. If it is for plaintiff complete the following. Plaintiff is or is not entitled to punitive damages. Do not enter any dollar amount but check one.

You can look at this.

What else?

Do you have some motions? Do you renew your motions at the close of the case?

MR. COLIN: Yes.

THE COURT: I rule identically now as I did then.

MR. ORSECK: One last thing, your Honor: The plaintiff moves for a directed verdict on the issue of liability only with respect to every cause of action except punitive damages on the ground that no jury can say that after even the October date, if that's the jury's determination, that Cities Service did not cause oil to be spilled on these premises -- I don't think that any inference to the contrary would be permissible and that a finding of no liability on the questions of trespass, negligence, and nuisance and breach of that agreement would be predicated only on speculation.

THE COURT: Denied.

I will see you at one-thirty.

(Time noted: 12:45 p.m.)

(Luncheon recess.)

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AFTERNOON SESSION - 1:30 P.M.

MR. COLIN: Rule 49-A of the Federal Rules of Civil Procedure, I believe, requires a special verdict or special questions to the jury, be framed in terms of the fact of the case. That was the form in which my proposed questions were submitted to your Honor. I would submit, respectfully, sir, that the questions that your Honor proposes to give them, to the jury, are not framed in accordance with the rule. They merely call for conclusions of the jury as to finding or not finding fault on the several counts of the complaint. I think, sir, that 49-A contemplates different questions.

For example, I propose that they find whether MGO was in control and operating the terminal. I think that is a question of the type contemplated by the rule, and to the extent that your Honor should submit proposed questions I would note my objection to that.

THE COURT: I am not asking them to make a fact finding. I am merely directing their attention to the plaintiff's causes of action. I am not asking them to find facts except with respect to the date of the release. That's the only one I feel we should have some guidance on so they can make a determination.

MR. COLIN: Note my objection to the form of

the questions submitted.

I do not think the case was tried in terms of compartmentalizing the causes of action. I don't think that the jury's breaking down the proof into such a compartmentalization --

THE COURT: I think this works to your disadvantage if they don't do that, because otherwise if they come back with a general finding of liability nobody will have any idea on which theory it has been imposed and it will be sustained if it is imposable on any theory.

MR. COLIN: We requested the findings on the facts.

THE COURT: Those I decline to put. I don't see any necessity for that. I decline to put yours to them. Certainly I will not put it to them in the form in which you gave them to me.

MR. COLIN: I made this statement for the record.

(Jury in box.)

MR. COLIN: May it please your Honor, ladies and gentlemen of the panel, Mr. Orseck:

We finally have reached the point in the trial of this case which might be called the moment of truth. This is when I must discharge my responsibility as counsel

for the defendant to analyze the proof, to present to you the logic and basic facts which you must ultimately distil out of this proof. There is, of course, proof that might be called black and proof that might be called white. My job is to present to you from the defendant's view point a fair and honest evaluation of that proof as we see it. I will try to do that without dramatics, without any appeal to your emotion or otherwise, only appealing to your intelligence and to the common sense to which his Honor referred when the jury was impaneled. That, indeed, is the course that is called upon by all jurors in performing their work.

In the performance of your work as jurors, if you are going to perform, I am sure in the pattern of the goddess of justice, whose statue you have seen so many times, the blindfold over her eyes and the evenly balanced scales held in her hands, that evenly balanced set of scales means to be fair, to be as fair to one party as to the other.

That blindfold does not mean that justice is blind; it means that justice sees no distinction, no difference, between the parties to a litigation; there is no difference of any nature whatsoever based on religion, sex, race, creed, rich or poor. In the halls

of justice all parties are dealt with equally.

Now you have heard a lot of proof in this case and you have seen a large number of exhibits, documents, photos, and so on and so forth. From what you have heard and what you have seen you have to make judgments. Indeed, you have seen witnesses, the way they have testified, what they have said, and you have to make judgments as to whether those witnesses were believable or whether their testimony was tainted with doubts, with some questions that were raised by what they said or how they said it.

In evaluating proof there is what I would call hard proof and, let us say, not hard proof. I don't have to tell you what I mean. I think your own good sense and your own good judgment knows the difference between hard proof, whether it be a photo or whether it be words from a witness and proof that is not hard, but to make clear what I mean I will cite, for example, a circumstance.

When an adversary of a party admits that something is so, when someone not identified with a party says, "This is the fact," then that's a pretty hard statement coming from the other side. Of course, a document signed by a party is hard proof. A document issued by someone who has no axe to grind in this case, and

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2 particularly if that someone is a governmental body charged
3 with a particular responsibility, that is hard proof.
4 On the other hand, what one of the parties
5 says is, of course, not of that nature and it is suspect,
6 and you have to consider it seriously before you accept
7 it, and you have to consider what has been put into the
8 record to cause you to doubt it and not accept it. In
9 these terms I am going to analyze the proof in this case.
10 The first fact in this case is that Cities
11 Service Company leased the oil plant in question to MGO,
12 Monticello Gas & Oil Company, in 1965, made a new lease
13 in 1969 continuing the old one, and that lease was in
14 writing: It was signed by Monticello, MGO, and Cities
15 Service, and it contained certain written provisions.
16 Among those provisions was the provision
17 that the tenant shall maintain the demised premises in
18 good condition during the term of this lease and shall at
19 the tenant's own cost and expense make all repairs of every
20 nature and description except structural to the demised
21 premises.
22 The tenant under this lease, of course, is
23 Monticello, MGO.
24 I think it might be well to point out now
25 that this case does not involve whether MGO -- we will call

it MGO throughout the case -- made or didn't make any repairs as between itself and Cities Service. That's not what this case is about. What this case involves is a question of whether the operator in control of this oil plant, MGO, did certain things which caused oil to be released and to ultimately reach the plaintiff's premises.

It is not necessary for me in any particular way to argue whether the oil did or did not reach the plaintiff's premises. The only thing that I argue, and what will entitle Cities Service to a verdict in its favor, is that it did not operate and control these premises.

You heard proof that the concrete drain along the surface was clogged with snow and dirt. If that concrete drain along the premises was clogged with snow and dirt it is self-evident that the lessee of the premises that was in control of the premises was chargeable with the responsibility to remove the snow and/or the dirt.

You heard testimony that the oil separator, the device designed to float the oil out of the water, was clogged with dirt. I don't know whether it was or it was not, and it is required that I prove that it was or it was not, but all I have to prove, what I have to convince you of, is that the operator of the premises, the only party who was there, and not Cities Service Oil Company,

is chargeable with that if it should be a fact.

With respect to that question, you had what I would submit to you to be the best and hardest proof of who was at the plant, who was in control of the plant, during the period with which this case is concerned. You heard Mr. Sam Green who took that stand; he testified that he was the general manager of Monticello Gas & Oil Company, and that they occupied the premises and Cities Service Oil Company had no personnel on the premises. Indeed, you heard proof that Cities Service Oil Company had its main office in Tulsa, Oklahoma, and that Mr. Langbein, the man who came around occasionally, had his office in Boston, Massachusetts. So, self-evidently, Cities Service Oil Company was not there and could not remove snow or dirt from the premises.

In fact, Mr. Langbein testified that he only came there a few times and on a number of those occasions he only came there because he was on a general tour of inspection, and he stopped by, and at times he didn't even see any Monticello executive, didn't see Mr. Green, and he said hello to the girl in the office and went on his way. That's the proof of who was in control of the premises and how minimal, how limited, it was, even the occasional visits of a Cities Service man.

There was some proof that oil moved from Monticello Gas & Oil Company premises to the plaintiff's lake. It moved in the form of what was said to be a film seen at times on various places on the surface of the water. There was a statement by a plaintiff's witness, Mr. Rosch, that the bottom of the lake had oil on it, but you may remember that Mr. Rosch testified -- and this he did on cross-examination -- that he knows that oil floats on water, and that oil cannot drop from the surface of a body of water to the bottom. In fact, I think we all know that just from the simple process of shaking a bottle of French dressing to try to make the oil that is floating on the top mix with the vinegar and water that is below it, and we know that after we shake it vigorously and apply it to our French dressing, in a very short time thereafter the oil, once again, is on the top and not at the bottom. This we know from common experience.

But we had very good proof that there was no oil on the bottom of the lake because Mr. Sedleck, the gentleman who testified this morning, was at the lake. He was at the lake to work in the course of a construction job being done there. This was a man completely divorced and unrelated to any of the parties in this case and any ofthe questions in the case. Mr. Sedleck said that there

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2 was a black muck on the bottom of the lake, as everybody

3 said, in fact, but there was no oil there.

4 So why do I dwell on that point when I say

5 that our defense is based on the clear fact that we did

6 not run the Monticello plant and could not, under any

7 circumstances, have caused the oil to run into the lake?

8 The reason I make mention of that, and the reason that

9 Mr. Sedleck's proof is so important, and, indeed, the

10 reason Mr. Rosch's admissions, the plaintiff's own wit-

11 ness, that oil won't drop, the reason it is important, is

12 that if there was no oil on the bottom of this lake then

13 there was no need to scrape the bed of the lake because

14 it was contaminated by oil.

15 That is a very, very important point. No

16 matter what it would cost to scrape the bed of the lake,

17 the enormous figure that Mr. Sedleck threw out, and the

18 modest figure that Mr. Adler presented to you with cal-

19 culations -- no matter what that figure is, on the proof

20 that there was no oil on the bed of the lake there was

21 no need to scrape the bed of the lake and remove what was

22 there and, consequently, the cost of doing that, whatever

23 that fact may be, is not an element of damage that can

24 be charged against the defendant in this case under any

25 circumstances, and I think that you will find that Cities

Service had nothing to do with that damage.

I have shown you that the premises were turned over to Monticello by lease. I have shown you that they have admitted that they alone were in the premises and that Cities Service had nobody there.

There was admitted into evidence in this case certain reports made by Conservation personnel of the State of New York. The reason I make reference to those reports is that they too tell us who is responsible for the conditions that they found. I refer to the plaintiff's exhibit called the Water Pollution Case Report. This, again, is the kind of hard evidence that I was talking about. We didn't make this report. The state of New York, Conservation Department, made this report through people whose job it was to perform exactly this work.

This report says: Operating, Monticello Gas & Oil, Inc. It says that Cities Service was the owner. There is no question about that. Cities Service owned the property, but Cities Service turned it over to Monticello. It was operated by Monticello in the course of its business, and its manager so testified here in court.

The same report says: Commonly used, Monticello Gas & Oil or MGO.

The same report says: Plant manager or

operator, Sam Greene, Monticello Gas & Oil, Cold Spring Road, Monticello, New York.

Interviews: Name, Sam Greene; Monticello Gas & Oil, Cold Spring Road, Monticello, New York.

So that is what this report of the Conservation Department shows.

The reference to Monticello runs all through this report. Location of Monticello Gas & Oil on United States G.S. map, Monticello , New York, shown by a circle and so on.

So this is hard evidence by a State Department involved in following up pollution as to who is the polluter, and there is no mention of anyone except Monticello Gas & Oil Company in terms of the operation of that plant, and except, as I say, that Cities Service was named to be the owner of the real property.

There was admitted in evidence another document, New York State Department of Environmental Conservation, April 17, 1972. This letter is written by the Department to Monticello Gas & Oil Company, Inc., Cold Spring Road, Monticello, New York. It is not addressed to Cities Service Oil Company. Nor is a copy sent to Cities Service Oil Company, and the subject matter of this letter is Re: Monticello Gas & Oil spillage. So that is what the State

of New York found in terms of determining the responsibility for oil being emitted from those premises.

There is in evidence in this case a copy of an order, a formal order, on an oil violation issued by the New York State Department of Environmental Conservation, and that order is: In the Matter of alleged violations of Article 12 of the Public Health Law and Article 17 of the Environmental Conservation Law by Monticello Gas & Oil Company, and that is the only company named in that order, and this order was consented to; that's the proof in this case. This order was entered upon consent after the charges were filed by the State, Monticello Gas & Oil Company consented to the findings of this order and to the $500 fine that was assessed against Monticello Gas & Oil.

I think that in terms of hard proof, not something that Cities Service said, but something that Monticello Gas & Oil said, and that the Department of Conservation of the State of New York said, I think that nails down the question of who operated that oil plant and who was responsible for any oil emissions from the plant. No matter what anybody else says as to that fact these documents don't change. These documents say just what I told you; they say that the State of New York

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2 Conservation Department found Monticello Gas & Oil Company
3 to be the operator of the oil plant and responsible for
4 the spillage, and Monticello's own general manager ad-
5 mitted -- and you heard him -- that only Monticello ran
6 that plant and Cities Service had no people there.
7 We have covered the question of whether there
8 was oil on the bottom of that lake or not, and I think the
9 proof is clear that there was not, that there was no necess-
10 ity to remove the soil from the bottom of the lake.
11 There is another question that has been
12 raised in the proof on this trial and that question is
13 the question of whether any fish were there, and whether
14 the oil condition did anything that damaged the fish.
15 This is, again, on the question of damage and not who
16 is responsible, and I think I have pinned that down rather
17 clearly to show it is not Cities Service, but I do want
18 to show you that no matter who is responsible the damages
19 here are invisible. The oil and the need to scrape the
20 bottom of the lake, that is already noted. The question
21 now is of the fish.
22 You have in this case two pieces of very
23 hard proof on the question of the fish. One comes from
24 the Department of Environmental Conservation in the State
25 of New York, the work done by its scientists in a laboratory;

and, two, the testimony of the witness whom you heard this morning, and that proof is not hard. That, in my opinion, is granite because that witness testified that in the fall of 1972, when he was there, he took, and his associates took, a substantial number of fish from the lake, pickerel, two feet long, and saw a lot of other fish flowing down through the release gates when they were opened to the lower lake. You can't get around that unless this man was saying something out of pure imagination; there is no way to get around that.

In addition to what that witness said, there is the fact that the Department of Conservation tested the waters that were alleged to be polluted and could be killing the fish. You may remember that we read from the deposition of Mr. Spodaryk, who was the biological chemist, who made the tests on the water and on the fish, and his testimony was that you would want 3 or 4 parts per million of oxygen in water to sustain fish life in a body of water, in a lake; his testimony was that his testing in his laboratory found the figure to be 8.2 in the actual water that was claimed to be polluted. There was more than twice as much oxygen as the minimum requirement for maintaining life. That proof is scientific and it is hard, but it is not something that you can see.

Mr. Spodaryk did something else, and this is all in this record that was admitted into evidence. Mr. Spodaryk took samples of the so-called polluted waters from the MGO plant, the swamp, and from the brook running in and from the lake, and from various places. He took a minnow, which we know to be a small fish, and he put that -- a different minnow in each case -- in each of those water samples that were supposed to come from the polluted places. His report shows that after the minnow was put into the water in some cases, because its environment was changing from some other water to this water, the fish showed some signs of distress, but in every case, without exception, those minnows, after being in that test water, water supposed to be polluted from the MGO plant and the swamp, were alive and normal. These are Mr. Spodaryk's words in his report: "The minnows were alive and normal after being in that water up to 144 hours." That's six days.

So, ladies and gentlemen, I think this can be added to the question of no damage sustained by this plaintiff on that score as well as on the question of no oil on the bottom of the lake requiring it to be scraped up and removed.

Another element of damage that is claimed here

is damage that the plaintiff claims came from the fact tht her rents were not as high as the rents in some other places that were described by Mr. Edison, the real estate man the plaintiff put on the stand. Mr. Edison said that the plaintiff's bungalow colony was comparable to five other places and, therefore, the plaintiff's rents should have been as high as the rents in the other places. That, to me, doesn't hold water because the important thing when you are talking about a living place is not the four walls representing the living place but where are they? What is the environment? What kind of facilities do they have?

On this Mr. Edison said he didn't take into account that the approach road to the Doralee property was industrial and not attractive in appearance. He didn't take into account whether there were or were not tennis courts. He didn't take into account whether there were two pools as compared to one. He excluded all of these other considerations and he just said, boldly: "These are the same and therefore I think they should have the same rent."

I suppose from this your thinking is supposed to leap to the conclusion, although my recollection is that there is no proof on that, that the difference between the Doralee rents and the other rents is somehow due to this

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2 so-called oil pollution.

3 Mr. Edison's testimony, as I say, was of the

4 wave-of-the-hand type. He didn't take into account any-

5 thing else, just that they were the same.

6 Then he said something that I think makes

7 his testimony highly suspect, to me very suspect. He said

8 he went to the owners of five different places, Lansman's,

9 Woodlawn, East Pond -- and the other two names escape me --

10 and they said to him, all five of them, five different

11 places remote from each other, "Our rents average $1100

12 for a one-bedroom for the season and $1300 for a two-

13 bedroom for the season."

14 MR. ORSECK: I'm always hesitant to object,

15 your Honor.

16 THE COURT: The jury's recollection of the

17 testimony will govern in this case, as I have instructed

18 before and I will instruct again. If there is any concern

19 about that recollection it may be read back.

20 MR. COLIN: I think that it is hardly cred-

21 ible that five different bungalow operators talking to

22 Mr. Edison on different occasions, separate and apart from

23 each other, say that on the average, "we charge $1100 and

24 $1300." I think you have to give a lot of thought to the

25 fact that this man who went out on this mission and

assignment to compare rents came back with no hard rent information and testified from that stand to no hard rent information. He didn't say the rents were precisely this figure at bungalow colony Lansman's, and precisely that figure at bungalow colony East Pond. He said they said, "Our average charge is this," and think that when you're talking about numbers, especially when you are talking about numbers to support a damage claim, you don't wave your hand so lightly and so easily and say that the numbers averaged so and so. You talk about precise numbers because numbers, by their very nature, are precise.

In respect of that claim of damage, I recall to you that Mr. Rieber, our witness, took the witness stand. Mr. Rieber pretty nearly painted you a picture. He unreeled a film, practically, of the road approaches and the environment and featues of these several colonies. Mr. Rieber pointed out that Lansman's was 105 acres and Doralee was 26.

Mr. Rieber pointed out that these other places were high land and Doralee was low-lying marshland.

Mr. Rieber pointed out that there were two pools at one of these places compared with one Doralee pool.

Mr. Rieber pointed out that several of these places had tennis courts with no tennis courts at Doralee.

So I think that he spelled out very real

reasons that there sould be a rent difference between those other bungalow colonies and Doralee.

Indeed, he said that Doralee is not the equal of any of those other three.

Then we had another bit of proof on this, and it is something that I think may appeal to your good conscience. Mr. Edison said -- he is not our witness but the other side's witness -- he said on cross-examination, "Yes, I agree that owners try to get the best rents they can and that rents reach their own fair and proper level." I think that's the general truth as to rents or any other thing for which money is paid, and I think the proof here, and this claim from the mouth of the plaintiffs' witness, is that Doralee was not as good a place as these other places; that the rents there floated to their own fair level as did the rents in other places, and the difference is accounted for, the different in rents was accounted for, by the really distinguishable physical differences between these two properties.

The differences between these properties were not only described by Mr. Rieber but, indeed, they were also described by Mr. Adler, who is a long-time resident of that neighborhood; but they were photographed, they were pictured, the environment, the negative unattractive

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2 environmental aspects of the area surrounding the Doralee
3 is photographically in evidence, and as compared to these
4 photos you had the statement of both Mr. Rieber and Mr.
5 Adler that the other places were on rural roads, none
6 industrial, none commercial, and that, I think, spells out
7 a real difference. Our own common sense tells us that we
8 won't pay to live in an unattractive community, in an
9 unattractive environment, the same money we would pay to
10 live in a good, clean, wholesome and attractive environment.
11 I have analyzed for you the lack of involve-
12 ment of Cities Service in this oil plant. It was not the
13 operator of the plant.
14 I have analyzed the lack of oil on the bottom
15 of the lake bed with no need to remove it.
16 I have analyzed for you the fish damage.
17 I have analyzed for you the rent differences
18 and the reason for that.
19 One of the important claims in this case,
20 and one of the importnat elements of proof relating to
21 damage, is what happened to the tenants and the occupancy
22 of the Doralee bungalow colony. This is hard proof, once
23 again, ladies and gentlemen. We marked in evidence a
24 schedule, and this schedule was based on lease documents
25 given to us by Doralee. This is their proof tabulated by

us. We put this into evidence. In fact, it was conceded. You may remember I had a young lady on the stand to prove it, and Mr. Orseck very kindly conceded, admitted, that it be marked in evidence.

This schedule of the occupancy of the Doralee bungalow colony for the years 1965 through 1973 shows 63.7 repeat rentals. That is 1965 through 1973. I don't have to point out to you, ladies and gentlemen, that people who come back to a bungalow colony, or to any place where they pay to be, they must necessarily come back because they are satisfied, and they found no reasons standing in the way of their coming back.

We got, during the course of the trial, some later leases covering the Doralee rentals for 1974 through 1976. This, again, is the material that Doralee furnished to us. We tabulated it and the tabulation for 1974 through 1976 is supposed to be after all of these horrendous things had happened, and the tabulation shows 81.3 per cent of the tenants were repeaters, and that's a very high percentage of renewed rentals. You may remember, indeed, when Mrs. Huss was on the stand she said in many cases the people signed up for the next season before they left the place during the current season, and the leases were written up now to be effective for the next season. So when you get

81-plus per cent of repeaters, I think you have strong evidence that there is no damage and that there are no conditions that were standing in the way of these people wanting to come back.

In connection with this last exhibit showing the 81.4 per cent of repeat rentals, we have a very interesting piece of proof as to the reliability of Mrs. Huss and the testimony that she gave before you in this court. You may remember that she was asked: Was there a single repeat tenant in the Doralee bungalow colony for the years 1974, 1975, 1976?

Her answer was no, and the truth --

MR. ORSECK: Hold it. That's going too far.

THE COURT: I sustain that.

You said it was a complete switch-over from 1972 to 1973, and it was that to which that question and answer applied. In any event, it is the jury's recollection that will govern.

Counsel asked for an hour and a half. I assume you will be through by three o'clock.

MR. COLIN: I think I will be through before then. I hope so, your Honor. I think that I have spelled out in terms of the hard proof that I made reference to initially that Cities Service had nothing to do with any

condition that may have damaged the plaintiff and that, indeed, there was no knowledge.

This brings us to another question, and that is the fact that it was established here that the plaintiff sued the Village of Monticello and the plaintiff claimed that the Village of Monticello created conditions that impaired her rentals. She was claiming against them the same thing that she is claiming to be the cause of damage in this case. You can evaluate the credibility of Mrs. Huss in terms of what you heard her say on the stand when she was asked about her own letters written by hand by her to the State Environment & Conseveration Department, and there are two such letters, and she said in these letters that her lands were polluted by sewerage, raw sewerage, and, of course, raw sewerage certainly would not make Doralee Estates very attractive and it would, of course, affect the waters.

When I asked her about that she said, "I was exaggerating." So you take into account what kind of credence, what kind of believability you will give to a person who writes letters and then says that the letters were an exaggeration.

You can like thought to how much belief you will apply in the case of this card that was put in evidence

this morning. It says fishing. The lady said there was no fishing, although it is on the card. It said horseback riding; and she said that there was not any. It said boating, and she said that there was not any.

As to the fishing, although she said there was not any, you heard about the fish that were actually there.

Then the next thing that I direct your attento is this document marked in evidence which says in effect that Doralee has released and forever discharged, and so on, Cities Service Oil Company. It says in the next paragraph that this release is delivered, and so on. Internally in this document there is the word "release."

Mrs. Huss was asked about this document which she signed and she signed it in the presence of her lawyer. She said that, but she would not admit that this was a release -- at least not by that name. She persisted in calling it a form. She signed a form, and I think it is very clear that having signed it before her own attorney she knew the nature of the document.

She was asked: How much did you get when you settled the action in 1972 in the Supreme Court?

She said: A minimal sum.

Then it appeared that the minimal sum was

$12,500. That is hardly a minimal sum. Certainly it is a very substantial sum against hte proof that she bought this property in 1965 for $70,000.

The question in this case is really twofold:

The first question is like the way we humorously refer to a mystery story. The question is: Who done it? That's the primary question. Who done it? We ask that because responsibility, damages, only attaches to the person who done it. It is contrary to our system of justice, it is contrary to our sense of fairness and of right and wrong, to stick a penalty onto a person if the who-done-it person is someone else. You don't punish the wrong guy.

In this case I think there is no question on the proof as to who done it. It is admitted by the Monticello general manager that they were in control.

The State's findings on the oil showings show that Monticello alone was involved.

I think that the who-done-it question is clearly answered, and that, of course, would be dispositive because there is nothing left if you find that Monticello and not Cities Service has the control and responsibility.

T he second question which is subordinate to the first question: How much did this plaintiff suffer?

Under any circumstances, how much did the plaintiff suffer?

The proof, as I say, is clear that she had a tremendous number of repeaters.

The proof is clear from the schedule that we put in evidence based on Doralee's own figures that the rents increased.

The proof is clear that she sought to, and in fact did, make improvements which would not be made, of course, if this property were afflicted with any kind of oil pollution.

So, ladies and gentlemen, I think we are left with the question just as squarely as I put it to you: Who done it?

It is a fact in this case, and I bring it out clearly and openly, that this plaintiff, for whatever reasons underlay its decision, elected to sue Cities Service alone, and not Monticello, and that means that having made that choice, having decided to go that route, going after only Cities Service, they are obliged to convince you that Cities Service and not Monticello is the party who done it.

I submit to you the proof is entirely to the contrary and it is very hard proof, including the admission of Monticello's own general manager.

I am going to show you how remote, how limited,

is even the mention of Cities Service in this case, and your memory, I am sure, is very good, and I try to remember and keep notes.

Cities Service was mentioned because it had an obligation under the lease to make structural repairs. You may remember that there was testimony that Cities Service at some time -- the date was not spelled out -- repaired the roof of the building at the premises. That repair had nothing whatsoever to do with causing oil to go over the premises and enter the plaintiff's premises. Repairing the pump and painting the trucks, this I think is the total mention of what Cities Service did, and none of those circumstances -- and I point out that all of them were in fulfillment of Cities Services' obligation -- not failure to fulfill its obligation but in performance of its obligation, and Langbein said that he came there a few times, physically paid a visit at times and did not find anyone, said, hello to the girl and went on his way, and this certainly made no contribution to the emission of oil from the premises. Then there was the final connection of Cities Service with these premises which was after February 10, 1973. That was thedate that Mr. Greene, Monticello's general manager, said they shut down operations and gave up the plant; they moved into another one that he mentioned was near the

racetrack.

#34 Incidentally, I do have to point out in connection with the plant being given up and and operations being closed down on February 10, 1973, that this suit was started after the plant shut down. This suit was started February 28, 1973.

Getting back to these recitals of the limited way in which Cities Service even appears on the scene -- and you don't spell out liability because someone appears on the scene -- Cities Service is shown after Monticello gave up operations to have removed the top surface of the oil plant and removed it with new, clean, surfacing put in, and to have removed the pumps, tanks, and improvements. This was after the plant was shut down and vacated by Monticello.

I point out to you that what Cities Service did in that respect and what Cities Service did in the prior repairs that I mentioned was to perform affirmatively obligations which were good and valuable to perform.

Monticello was under an order by the State Conservation Department in the proceeding where they paid the fine. They were under an order to clean up their place. When they moved out and when they didn't clean up that place, Cities Service did, and that is an indication of

good citizenship and an expenditure of substantial money to evidence that good citizenship because Cities Service went in there, cleaned up the surface, put in a clean surface, and removed the physical facility at its own expense and none of those acts -- either the repair of the roof or that -- is indicative of any act or omission on the part of Cities Service that contributes to this plaintiff's damage.

The only proof here lies in that sheet of evidence, all of which I touched upon in my summation; namely, that this plant was exclusively under the operation and control of Monticello; that Cities Service had no personnel there; that the findings by the State Conservation Department were entirely charged to Monticello Gas & Oil. They were operational findings, failure to remove snow from the gutters where the oil separator was; failure to remove dirt from the oil separator.

Cities Service in Tulsa certainly could not do that. Monticello could have, and if it was not done, and if it caused any pollution, they were at fault.

However, I showed you that even if there were such fault there were no visible damages. There was no oil on the bed of the lake. There was no necessity to remove it. There was no impairment of rents: there were lots of

repeaters. There was nothing that can be attributed, not even a fish kill -- and, incidentally, apropos of that fish kill, the State's report and Mr. Spodaryk's testimony, which I read to you from, his deposition, said that a fish kill, when it occurs, occurs out of a single separate cause. We don't know what that single separate cause was, but we do know there were fish living in that lake during that alleged period of oil pollution. We do know that the waters of that lake were shown by laboratory tests to support the fish life of the minnows. So the fish kill, I think, clearly is not attributable to a pollution condition. There probably was some kind of poison, some kind of bad material, that came down at one time and resulted in the fish kill.

On the proof of this case it could have been the sewerage, the pollution, that was admitted by Mrs. Huss.

I am at the end of my time and pretty much at the end of my voice as well, and I say to you that in resolving the questions in this case I believe there is no way on the hard proof to find Cities Service responsible for what I say is the "no damage" in this case to begin with.

I want to leave you with this thought, a request, a plea. My summation ends now. The plaintiff, in

further proceedings in this case, will resume tomorrow. I want you, as well as you can -- and I know you have a sense of fairness, you have a sense of responsibility as jurors -- bear in mind what I have reviewed with you. You have to carry this in mind longer than you have to remember the plaintiff's summation. That summation will be given to you tomorrow, which will be before you deliberate.

Fairness suggests that you try to carry in mind what I have said to you, and I know you will. I am hopeful that you will remember this hard proof, this real hard evidence, coming not from us but from State people, the MGO people, from the plaintiff's own witnesses, showing no damage, and from that most disinterested of all witnesses, Mr. Sedleck, who was here this morning. He said they bulldozed those stumps out, and Mr. Adler said the same. Whatever the figures were, the work was not necessary because there was no oil there.

This is the end of the road for me. Please store what I have told you away in your computer, carry it there alive, so you can recall it when you begin your deliberations in this case.

Thank you very much.

THE COURT: Ladies and gentlemen, as you see, from the way the room has been filling up, I have matters

in other unsettled cases for the balance of the day. I am going to excuse you until ten o'clock in the morning.

I concur in Mr. Colin's remarks: You must carry all of these contentions and argument with you into the jury room. You are dutybound to do that.

Continue to keep an open mind in this case because we are not at the end. We will hear from Mr. Orseck in the morning and then you will receive the Court's charge before you go into the jury room.

Leave with completely open minds and don't discuss the case amongst yourselves or with anybody else.

See you in the morning.

(Time noted: 3:00 o'clock p.m.)

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2 DORALEE ESTATES, INC.,
vs.
3 CITIES SERVICE OIL CO.,
vs. 73 Civ. 907
4 MGO CORPORATION

5

January 14, 1977
6 10:15 a.m.

7 (Jury in box.)

8 THE COURT: You may proceed.

9 MR. ORSECK: Good morning, your Honor, and
10 ladies and gentlemen.

11 This is plaintiff's final opportunity to
12 address you, and since the plaintiff is Doralee Corpora-
13 tion, and a corporation cannot talk, I am going to make
14 the closing remarks on behalf of my client for Doralee.

15 I suppose it would be less than gracious for
16 me to begin this summation without thanking all of you for
17 two weeks of obvious close attention, except for one little
18 incident; maybe counsel bored you somewhat, but in all
19 seriousness, you all did pay close attention and we appre-
20 ciate that. That's enough for amenities.

21 While I would like to be a nice fellow --
22 and I am sure everybody would like to be nice, ladies and
23 gentlemen, that's not my purpose. My purpose in represent-
24 ing Doralee Estates in this case is to see that justice is
25 done. That's what I am about to do.

I am an advocate. I am not here to look after Cities Service and I am not here to look after Monticello Gas & Oil. I am an advocate and I am going to present this the best way I can, in the most favorable way to my client.

I don't hide that.

So I ask that if in the remarks that I make to you, you think that I am stepping out further than the proof warrants, just don't pay attention to it and keep in mind what my job is: I am here for Doralee.

Let's not forget for one moment what this lawsuit is about. I shall not catalogue all the issues that were attempted to be raised by the defendants which the case is not about. Let's talk about what it is about. It is about oil pollution, isn't it?

Is it about which bungalow colony is nicer? Which one has different rents? Or is it about how much oil?

It is about oil pollution.

This case, you would find, consists of two claims, really. One claim -- and that's the only one touched upon by Mr. Colin in his summation -- is Doralee's claim that she sustained certain damages because of the pollution, and she seeks at your hands compensation for those damages. Those damages, I trust, the jury on the evidence, can readily

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2 ascertain. There will be some amount or another, more or
3 less, and I will discuss this as we get into the summation
4 later on. We call that the claim for compensatory damages,
5 compensatory to compensate, to make whole.

6 Ladies and gentlemen, I do not think that it
7 has been called to your attention in this case at an earlier
8 junction, except very briefly and perfunctorily, in the
9 opening statement that there is another claim in this case
10 which is of all importance. It is important not only to
11 the litigants but to everybody, and that is the claim for
12 punitive damages. That's what this case is really all
13 about. That's what we are here for, for the last two weeks.
14 That's the reason there have been 100 exhibits, more or
15 less, marked and some received in evidence. That's the
16 reason there has been a bitterly fought controversy. That's
17 why there were so many witnesses -- not because of the
18 $50,000 or $60,000, or maybe $40,000 that you may see fit
19 to award here for the damages that she actually sustained.
20 True, that is a lot of money, but it is insignificant with
21 respect to what the second claim is all about, punitive
22 damages.

23 In any lawsuit, after counsel have made their
24 closing remarks, their summation, the judge addresses the
25 jury and the judge instructs the jury as to the rules of

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2 law, which it is to apply to the facts in the case. That
3 will, of course, be done by his Honor at the conclusion
4 of my remarks.

5 The judge will instruct on the law of puni-
6 tive damages, and by the same token, as a basis of compari-
7 son, you know you cannot take the facts from Mr. Colin or
8 from me, you have to decide what the true facts are on
9 the basis of the evidence; you cannot take the law as I
10 tell you it is. That's not my job. That's the judge's
11 job, and you must follow the law as the judge tells you it
12 is. But for purposes of summtion, I have to allude to
13 propositions of law; please keep in mind that you take the
14 law from the judge and not from me.

15 I can assure you that the judge will address
16 you on the issue of punitive damages. In addressing you,
17 and after addressing you on that subject, the Court will,
18 upon your retirement to the jury room, hand you a slip of
19 paper which has some questions, and at this juncture, at
20 this moment, I am only interested in one question. I believe
21 it is going to be the last question, and that is this --
22 and I am going to paraphrase the question:

23 Does Cities Service and others who might
24 pollute, not only Cities Service but others who are in a
25 position to pollute, there can be other oil companies, should

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they be --

MR. COLIN: Your Honor --

THE COURT: I sustain the objection. Don't paraphrase. Let me put it that we are dealing with this case and the parties in this case only.

MR. ORSECK: You will hear the law from the judge and what punitive damages are, and whatever the question is, I have been instructed not to paraphrase it, this is not the transcription on the ruling, I will say understand the law as given to you should there be punitive damages awarded in the case.

THE COURT: That's what I will ask you to answer, ladies and gentlemen, whether you conclude there should or should not be punitive damages.

MR. ORSECK: I shall reserve for the final five or ten minutes of my summation the arguments to you why that little question should be answered Yes.

Mr. Colin yesterday said that the moment of truth has arrived, and so it has. He talked to you about hard proof. Then he discussed the defendant's case not even in terms of hard or soft proof but in terms of guessing. That was smoke. Smoke? That's pretty funny. At an earlier stage in this trial, you know it, Mr. Colin attempted to convince you that this fully documented oil

spill resulted from what? From soot from a chimney. Yes, he did. That was not mentioned in his summation.

He also tried to create an inference that oil from automobiles on the highway in the rain was washed off and caused all this pollution. Did he not do that? Otherwise why did he ask those questions and why did he press them to keep asking them over and over again?

He talked about hard proof. Did he as much mention to you, ladies and gentlemen, yesterday the fact that Ted Hudson testified in this case, that Ted Hudson was on the property in '74, that his presence on exact dates on those premises during 1972 was noted in officially filed New York State documents?

In one of the exhibits, Exhibit 27, that's Mr. Kwak's hand notes -- there it is right there, Ted Hudson, environmental technician, the dates he was there and what he did.

What was Ted Hudson's job? What was his life concerned with from nine o'clock to four o'clock or eight o'clock to five o'clock, whenever they work? It was concerned to determine whether or not there is pollution or oil.

Ted Hudson went to the lake to Doralee only for that purpose, in September he was there with Mr. Rosch

and they dug holes, six of them to be exact, in different places. They dug them, entered the places on the map, and a record was made by Hudson and Rosch both, how far the oil permeated to the bottom.

That was not mentioned by Mr. Colin. Instead, what he did was he told you that hard proof came from the words of mouth of the last-minute witness, Sedleck, who yesterday morning, for the first time -- somebody woke him up yesterday at six-thirty in the morning. He came down here. His boss called him, his boss who was contacted by somebody else, and he came down here and he said he was a pipe layer; that was his job. No pipe was laid in the lake.

He said the lake was drained and he said that he didn't notice any oil there. He said there were fish.

I submit that even without the arguments that I am about to make, the defendant would be highly suspect.

The case was commenced in February of 1973. All of a sudden, the last day of trial, six-thirty in the morning, nobody ever spoke to the guy, and down he comes and he tells this story. I really don't know how people get the nerve to do this to a jury. It just doesn't make any sense.

MR. COLIN: I object to that comment. I think it is out of order.

THE COURT: Strike out the last comment, just the last few words.

MR. ORSECK: All right.

In this case there are certain facts, believe it or not, that are not in dispute. One thing everybody agrees on, there is no dispute about, that the lake was drained in the spring of 1972 through the winter of 1972. You got that? All right.

Mr. Sedleck testified that in the fall of 1972 that was when he observed the premises. Now in the fall of 1972 how could there be fish there? The lake had been drained since April. That, ladies and gentlemen, is number one.

Number two, this is really the clincher, this picture was taken in the winter of '73. You can see. He says that stumps were removeed. Do you see any stumps removed? This is cold turkey, isn't it? It is just cold turkey.

I submit -- and let's be charitable -- for some reason or another Mr. Sedleck was mistaken.

Hard proof, soft proof. Compare Hudson who made notes of pollution in the lake, not only for September

17 of 1972 but a whole lot of other dates, a whole lot of other dates. He filed reports and that proof is ignored by my adversary, ignored completely.

I trust that you will look at Exhibit 1 and so that you may refresh your recollection with respect to that.

Mr. Colin has told you there was no pollution. He said if there was pollution it was by soot. If it was not bychimney soot then it was the highway. He says: If it was not from that, maybe it was real pollution but we didn't do it, Monticello Gas & Oil did it. If Monticello Gas & Oil did it, none of it got into your lake. If none of it got into your lake, you were not damaged. If some of it got into your lake, you were not damaged too badly.

I ask you: Is this a fair resume of his defense or not? Is that what he told you? Did he tell you any more or any less?

Jack be nimble, Jack be quick: An answer, he attempted an answer to everything; but remember, he didn't address the issue of punitive damages, and we will get to that at a later junction.

I want to spend a few minutes to attempt to convince you -- not that it needs much convincing -- that Cities Service was the owner and, in some respects, the

operator of the premises. You are going to hear from the Court, I do believe, that even if Cities Service were not the operator, that the law and common sense go hand in hand. If a landlord knows that his property is being used in a manner that it harms somebody else, he is liable. It is that simple. You will hear it from the Court. Did Cities Service know what was going on?

I am going to read from Exhibit 6, which is a memorandum with respect to Cities Service that somebody wrote somebody in one group or in Tulsa wrote to somebody in New York:

This tank station was purchased from Monticello Gas & Oil in September, 1957, when Cities Service acquired the assets of MGO. Cities Service bought that plant from Monticello Gas & Oil back in 1957. That's when they got it. Whom did they buy it from? Monticello Gas & Oil.

Simultaneously the principals of MGO became their commission agents. He talks about hard proof and soft proof. This, ladies and gentlemen, is in writing. There ain't no way for him to get away from it.

Look at Exhibit 6. They became their commission agents. You remember I asked what commission agents are? Well, they are part of Cities Service.

MR. COLIN: I object to that.

THE COUMT: Overruled.

MR. COLIN: There is no proof to that effect.

THE COURT: Overruled. It is argumentative.

MR. ORSECK: You heard what commission agents do. They go around and they sell Cities Service. The bills are made from Cities Service to the customers. The customers pay Cities Service and there is a commission.

Mr. Sam Greene, he said sometimes they bought some oil from somebody else. That doesn't change anything.

You saw the picture of the premises. Whose plant is that? You go by that: Whose plant is it? Look up at the top.

Maybe Mr. Colin said that that's not hard proof. I got some hard proof. How about both Mr. Langbein of Cities Service and Sam Greene of Monticello Gas & Oil telling you, both under oath, without any hesitation or reservation, that the culvert under the road and the original oil separator ten years ago was installed by who? Do you remember? Cities Service.

Everybody has to do his job. Mr. Colin tried to do his job. There were some short cuts in his summation.

MR. COLIN: Your Honor, I think that's not fair comment.

THE COURT: This is argumentative, ladies and gentlemen. It commends itself to you. You may accept it. If it does not, you should reject it. This is argument of counsel.

Proceed.

MR. ORSECK: My learned adversary tried to paraphrase or he tried to put together his version of Mr. Langbein's testimony. Do you remember that? He left out the part of Langbein's testimony that is important for your consideration: that Cities Service all during this time period, right up until the time the plant was closed, was responsible financially for the control of pollution. Requisitions for tins to collect oil were made by MGO to Langbein, were they not? And Langbein had to call Texas, Tulsa, and that's the way it is. That's the testimony. That's what hard proof is. It is not a quick glossing-over in an attempt -- I'm not saying what he attempted to do, but it was in the hope that the jury is not going to remember what happened here in court.

I am going to refer to some more documents. Their numbers are 6, 7, 8, and 9 in evidence. These are documents where Cities Service in intercompany correspondence said: We have to do something about pollution. It is our responsibility.

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I am not going to take the time out of my hour and fifteen minutes to read that to you, but it is here. It is here. This is not an attorney commenting on the evidence. The exhibits are here for you to read yourself. That is what hard proof is.

In the document Cities Service says: We are under a court order; we are under a citation from --

MR. COLIN: I object to that. There is no such proof whatsoever in the case.

THE COURT: Exhibit 5 is such a record.

We are now under court order to either install an oil water separator or cease operations.

MR. COLIN: There was a reference to a court order on MGO, as I remember.

THE COURT: That's what the Cities Service exhibit says, Cities Service construction requisition Exhibit 5.

That objection is overruled.

MR. ORSECK: It is here, if you want to see it.

A minute ago, just a minute ago, I was speaking to you about the rule that perhaps the judge would discuss, that a landlord is responsible, in any event, for damage caused to his property as long as he knows about it.

Exhibit 6 shows clearly that Cities Service knew since 1969 not only that the plant was polluting Doralee lake, but that they had been cited by the New York State Department of Environmental Conservation even at that time.

Of course the defense is: We didn't do anything.

I want to just show that Cities Service beyond any doubt did do some things. In one of the memorandums from Cities Service to somebody else it says: When we take those tanks out there is always a lot of oil in the bottom of the tanks and somebody should do something about it.

Nothing. They could not even gracefully leave the premises. When they dismantled the plant with these cranes, they tipped over the tanks and they did more damage the last minute than they probably had done for the last six months before.

Cities Service and MGO both claim that somewhere between February and May MGO was no longer there. Do you remember that? For the moment the dates are not important. What is important is that Cities Service did this, and nobody else. It is not for you in this case to determine which one of them spilled more, as long as you find in this case that Cities Service knew what was going

on, knew that the plant that they owned was a cause of pollution. That's enough to hold them responsible. If you find that they participated init, just so much the more. It is that simple. It is that simple.

What are the damages? What are the damages?

Damages are claimed by Doralee. Forget about the punitive damages for a minute. They are claimed for two reasons. One, we claim the lake has to be restored to its original condition and it is up to to fix the amount. I will try to help you do it, and keep in mind that it is human nature and my job -- I am looking for the most and he is looking to keep it down to the least. I don't have to tell you that. Nobody is any fool. It is the same thing with rents. We are trying to show you the most that we possibly could have lost and Mr. Colin wants to show you the least.

Following that logic through, each side called an expert on real estate, right? We called Edison, and you can be sure he didn't come down here in good graces. He was paid.

Mr. Colin called Mr. Rieber, and he, likewise, came down for the very same reason. You heard each one of them say what they had to say.

I am not here to defend any witness, to pick

on anybody. I do want to make some observations. In evaluating a witness, any witness, what do you do? You size him up just like you size up people on the street; that is, at your job and social life.

You say: Is this person leveling or is he worthy of belief? Does he answer directly? Does he look me in the eye? Does he answer questions directly or is he evasive? Aren't those the tests you use, every one of you, in determining who is credible and who is not? That's what you do in court.

Edison answered the questions that were put to him. He answered the questions. He answered them enthusiastically and eagerly on cross-examination.

Let's talk about Rieber. Rieber attempted to paint two separate pictures: one that Doralee was in a rundown and broke-down neighborhood; and, number two, that the other bungalows were in a top neighborhood. That's what his job was. That's what he was asked to do, and that's what he tried to do.

When I asked him about Colonial Hill Apartments, which has a 400-foot common boundary with Doralee, did he indicate to you that it was an inadvertent mistake that he didn't tell you about it? Was that your impression? Or do you think that they just thought they would get by?

My impression -- and, of course, you have to go by your impression -- was that he was hiding. Why do I say it? When I reminded him of it he knew the apartment structures up there. He said, "Oh, I forgot. I'm sorry. It is there." He hesitated.

I asked him, "Do you know any better place?"

He hemmed and hawed. Finally he owned up.

I'm not going to say anything. You judge that yourself.

Let's go a little further. He said there were no parks near Doralee and we showed that there were. And he owned up. He owned up to the Cook's School and the tennis courts nearby, etc.

#2 Now, let's take it the other way. Up at the East Pond Bungalow Colony he tried to paint a picture that it was in a perfectly beautiful neighborhood and surrounding, and he omitted to tell you it had a common boundary with an old, abandoned hotel that had had some fires, some collapses, and he equivocated, and equivocated, and equivocated. Did he or did he not? Didn't he say, "Oh, gee, I forgot about the El Dorado."

To begin with, he didn't tell you about it in the first instance. And if Doralee had had a lawyer that was not from up there it would have been put over on you.

Isn't that right?

Mr. Lieber went to great lengths to tell you that there was a Texaco station a mile and a half from Doralee. He forgot to tell you that almost across the street from East Pond Bungalow Colony there was a gas station too.

What I am doing, I am getting bogged down into the trap of my opposition. I am talking about nothing. This case is not, as I told you, about which bungalow colony is better. When the mother of all bungalow colonies gave birth to all bungalow colonies she didn't give birth to twins. It is preposterous. In some respects it is the same and in some respects it is different, but let's get to the issue.

Plaintiff's Exhibit 66 in evidence shows that for the period of 1973 through 1976, Doralee had no rent increases. I repeat, no rent increases. I trust all of you have your own common experiences throughout the last four years with respect to prices. Do you know of anything that has not gone up in the last four years? Do you know? Do you know? Do you?

Forget about Lansman's and East Pond, and everything else. Doralee did not get increases. And she got the people back because of the economic law of the ungle. She tried to get the most, and the tenants tried

to pay the least. The tenants had a bargaining point, didn't they? "Oh, you got the lake. We will come back and we are not going to give you any more money."

I don't know which of you jurors live in apartments. It is the same thing as an apartment in New York. If you are not getting the services what happens? One of two things: you either move out, true? Or, second, what do you do? The landlord comes for an increase; are you going to give him an increase if you are not getting your services?

I submit that a fair way of assessing the loss of rents would be just this way: There were 23 bungalows. Actually there were more, but you can call them 20. From 1972 to 1973 there should have been an increase. Remember, I am throwing a figure out, but it is for you to make the examination. I am going to throw out a figure of $150 for an increase. You might think it is more or less, but at $150 forthe first year, twenty bungalows --

MR. COLIN: Your Honor, may we approach the bench?

THE COURT: This is argument.

MR. COLIN: I don't think the use of a blackboard at this posture --

THE COURT: Do you need the blackboard?

MR. ORSECK: For five figures just as I talk. I believe --

THE COURT: At some later point these figures will be read into the record so that the contents of the blackboard will be made a matter of record. Go ahead. It is a question of preserving the record. You must use the blackboard in the way that there can be a record hereafter.

MR. ORSECK: I would suggest to you that you do not call it 23. It is too hard to multiply, so therefore I say call it 20 bungalows for which she didn't get any increase until 1973. There is proof in the record of the increases of the other place, say $150. That would be $150 times 20, which would be $3,000 for the first year.

The second year there is another increase which would be this three plus three more, $6,000 for 1974.

For 1975 it would be this $6,000 plus three more, so it is now $9,000.

For 1976, again, three more on top of this, and that would be $12,000.

Now, again, you don't have to accept this, but I urge that this is a logical way of ascertaining damages. I will go one further. We are entitled to damages up until the time the repairs are made.

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Adler said that you need good weather to drain the lake. We are going to lose 1977 too. That's 15 total. Adding this to the total, 45. I submit to you that the figure is $45,000 for loss of rents.

You make the determination. You make the determination. Remember that during that period of time we got nothing, nothing. Did you pay increases?

Nobody disputes that others paid increases, the other bungalow colonies. You know, he talked about averages. Edison's testimony was sketchy. Mr. Edison had notes which were marked for identification and which I asked to be marked in evidence. Mr. Colin said no. Do you remember that? I will give you the exhibit number. I will give it to you. There was an exhibit marked with a tag like this that was not received in evidence. I offered it and my adversary didn't want it.

MR. COLIN: Your Honor, I don't admit or reject proof offered in evidence. I think that is not fair comment. Your Honor is the only one --

THE COURT: You took a position.

MR. COLIN: Your Honor would have to rule on it. If I took a proper position and your Honor didn't admit it, that's not fair comment.

THE COURT: It depends on whether any argument

in summation was inconsistent with the position you had taken during the trial, and as to that I will let the jury's recollection govern.

MR. ORSECK: That's enough about the loss of rents.

I suggest that there is room in this case, but I am not urging you, that increases could have been more. Don't forget, this is on the basis of 20 bungalows and not 23; by the same token it might be less. It is purely up to you. You cannot take a ruler, can you? It is a jury question. Juries do the right thing.

Let's talk about the lake bottom. I will talk about that for a few minutes and then get to the all-important punitive damage.

With respect to the lake bottom, in Exhibits 6 and 7, Cities Service back in 1973 said that to take six inches off one-eighth of an acre, it was something like $6,000 or $7,000. $6,000 or $7,000, ladies and gentlemen. I should find it to read it to you. Cities Service in a memorandum said, "We can only get two bids at this price." Why didn't they call Adler? If you stretch his testimony to the extreme, the lake would be $2500 for about two acres. Divide that by 16, it would be like $125. They should have gotten somebody for $125 to do theirs; isn't that right?

Back in 1972 to do an eighth of an acre, here it is; and they paid the money and the exhibits are in evidence.

Adler said too, did he not, that he would not commit to do the job for that without going out there on the lake. Of course they tried to show that the bill was high. Listen, that's the job. That's his job. They tried to show that the lake was smaller, right?

Rosch paced it off. Adler, at best, took a 1966 map, and you know there was a spillway there with batten strips, and every eight inches it goes out as far as she said. So certainly the lake is bigger than two acres. Nobody questions that. Again, you fix the amount. You fix the amount. You have heard what everybody has had to say. If there was nothing else in the case that would be your only job. It is a jury job. Use your common sense and keep in mind that Cities Service in 1972, for an eighth of an acre, six inches of oil-saturated soil, $6,000, $7,000. And it is in those exhibits, too. It is not necessary to read them, is it? It is in there, $6,000 and $7,000.

It is our claim that Mr. Rosch's bill was a proper one, and again, you know, in street talk, without appearing to be a pig, because that can backfire, that was at 1972 prices, was it not? Wasn't it Rosch's estimate?

I don't know if any of you know about construction costs, but I don't think you are bound, if you don't feel to be bound, by Mr. Rosch's bill of $21,000. Again, it is purely up to you.

I am going to talk about this release for punitive damage and then I will sit down.

You remember, back in 1972 there was a settlement made in a court in Monticello. Doralee said that payment extinguishes all claims to the present date, April 25. Doesn't it say that?

Then the judge said, "Is that your agreement?"

And everybody said, "Yes, it is. Okay."

Now, sometime later, she signs this agreement or release or form. I don't care what it is. It is a release. It says: "This release is delivered pursuant to a stipulation of settlement, a copy of which is annexed hereto." It specifically limited the claims, etc., as specifically set forth in said stipulation and as conditioned therein. So October 24th, that was a mistake. This was intended; it was attached to this, and it says that this release is intended to be exactly in conformance with the stipulation. It is a mistake, and they tried to take advantage of the mistake. They could attack six months of respite from April to October. Even if they did,

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2 which they couldn't -- this is preposterous. It would not

3 cut the damages two cents, but it is a red herring.

4 Incidentally, on this mater, do you remember

5 Rieber said there were no golf courses in the vicinity?

6 Here's Doralee. What does it say right here? "Golf Courses."

7 He said there were none. There is Memorial Park, the

8 Cooks School.

9 Ladies and gentlemen, this case is about

10 punitive damages. Do you believe that Cities Service should

11 be warned or deterred from doing this to somebody else?

12 All you have to do is answer it on the written form that

13 the Judge is going to give you. It has nothing to do with

14 what is up there or how much there is involved to clean

15 the lake. The principle of pollution is involved. Should

16 they be warned or deterred from doing it again? You are

17 going to answer that yes or no, and that's what this case

18 is all about. That's why you are here. That's it. This

19 is the day of judgment. This is the moment of truth.

20 Why should you do it? Why should you answer

21 it yes? The Judge is going to read New York statute law,

22 the Environmental Conservation Law, and one of the sections

23 says -- this is our own New York State Legislature speaking:

24 It is the public policy of the State of New York --

25 MR. COLIN: Your Honor, this document so far

as I know, is not in evidence.

THE COURT: I assume he is reading from the law of the State of New York that I am going to charge the jury on. I don't know if a statute of the New York State Legislature has to be in evidence.

MR. COLIN: That's your province and not counsel's, to determine what will be given to the jury.

THE COURT: I have ruled that it would, so counsel may continue in accordance with that ruling.

Go ahead.

MR. ORSECK: It is declared to be the public policy of the State of New York to maintain reasonable standards of purity of the waters of the State consistent with public health and public enjoyment thereof by propagation and protection of fish and wildlife -- and I skip -- and reasonable methods to prevent and control the pollution of the waters of the State of New York.

The Judge will read definitions to you which clearly include Doralee's water as waters of the State of New York, and that will be the next section. The Judge will read it and I will not take the time myself.

Then this is what it is all about. It shall be unlawful for any person, directly or indirectly -- do you know what "directly" or "indirectly" means? A landlord

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knows it is being done and does nothing to stop it! We know this from the interoffice correspondence. "If we show, the fine will be more money. We know it is our obligation, but you, MGO, you go there so that Environmental Conservation will think it is not us."

It shall be unlawful for any person directly or indirectly to drain or run or discharge into such waters organic or inorganic matters that shall cause or contribute to a condition in contravention of standards adopted by the Department.

What is the most important part is that violation of this is a crime, and that's the last section that the Court will read to you. It is a crime.

I believe that under the Court's charge, the rules the Judge is going to give you, if you find that Cities Service did violate statutes for the State of New York having to do with pollution, then you are certainly free to answer that last question Yes. You will hear it from the Court.

I promised that I was going to sit down. I didn't get as dramatic as I rehearsed. Remember, this is a civil case. This is really, really important. In a civil case the one who is doing the suing, fair enough, has to do the proving. We are doing the suing and we

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2 have to do the proving. How much proving do we have to do?

3 The Judge is going to tell you about the

4 burden, which is very simple. It is a fair preponderance

5 of the evidence. What is it? It is just this: Do you

6 remember Mr. Colin said that you have the scales of Justice?

7 Do you remember that? Well, the fair preponderance of the

8 evidence is just this: When we came in here last Monday

9 we came in here as equals in the eyes of the law, didn't

10 we? Even up. We were each on that scale, and this is

11 the way the scale was (indicating). We are on one side

12 and Cities Service is on the other side. A fair preponder-

13 ance of the evidence just means this: Did we tip the

14 scale? That's all it means.

15 You listen to the Judge. It is not like a

16 criminal case "beyond a reasonable doubt." Did the scales

17 tip in our favor? Did they? Or did they tip the other way?

18 On the issue of punitive damages: Did they

19 violate the statute? Did they violate citations of

20 Environmental Conservation? Did they violate the agreement,

21 the court agreement?

22 It has nothing to do with punitive damages,

23 but my brother will get mad at me if I don't say this: You

24 remember the pollution, the oil spill and the fish.

25 Mr. Colin was trying to get you to think that it is from

sewerage or somthing else. Here is Exhibit 26 in evidence. See what this form says? United States Department of the Interior, Federal Water Pollution Control. This is in evidence. What does it say:

Oil only known pollutant. Oil only known pollutant.

I know the reason he handed it to me. This is another violation of the statute. Violations of the statute are grounds for punitive damage.

This has been a long case, ladies and gentlemen. I am sure that there has been much important matter both by way of testimony, by way of exhibits, that I have not alluded to. I am sure that anything that is important, regardless of whether Mr. Colin or myself alluded to it, even regardless of whether or nto the Judge intertwines it with his charge on the law, you know it is impcrtant. You know, as people of common sense, people of ordinary, everyday intelligence, you can size a situation up.

This job may seem difficult now. After you hear the Judge's charge and after the questionnaire is put to you, I am sure there is not going to be any problem in arriving at a just verdict in this case.

The memorandum or the questionnaire is going to say: Did Cities Service commit a trespass? I will not

tell you what a trespass is. The Judge will tell you that. I will tell you that is knowingly going on some other property and causing damage. Did they commit a trespass or did they know the trespass was being made from their property to somebody else?

Was there a nuisance? That's going to be another question. A nuisance is almost the same as a trespass. The distinction is this fine (indicating). I don't think it makes a bit of difference.

THE COURT: Let me tell the jury that what they have to find falls under these categories.

MR. ORSECK: Listen and the Judge will tell it to you crystal clear. It can only lead to one conclusion, to a just conclusion, and the just conclusion in this case is that Cities Service violated Doralee's rights.

But, more important, that's only Doralee. They violated the pollution statutes of this State and they have to be made aware --

MR. COLIN: I object to that reference.

THE COURT: I will sustain the objection. I will charge them, the jury, on what has to be found. If the jury is to find punitive damages are awardable, I want to say that Mr. Orseck, notwithstanding his enthusiasm, you are here to decide a number of issues and all the issues are

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2 important. We are here not only on one thing, we are here

3 on a number of things.

4 MR. ORSECK: What I was trying to say was

5 that as far as the plaintiff is concerned, as far as the

6 plaintiff's contentions are concerned, that's the important

7 thing.

8 Of course, every issue in the case is import-

9 ant and has to be decided. There is no question about that.

10 Listen to the charge. Do what is right. Let

11 the verdict be one that will permit you the next day when

12 you get up to look yourself straight in the eye in the

13 mirror and say, "I know I did the right thing." Will you

14 do that? Nobody can have any quarrel with you if you do.

15 Thank you.

16 THE COURT: Ladies and gentlemen, we will

17 take a recess for about ten minutes.

18 (Jury excused.)

19 THE COURT: Give Mr. Golden a recitation of

20 what is on the board.

21 MR. COLIN: I would like to recite it, if I

22 may, Mr. Reporter.

23 MR. ORSECK: A card has been made and we will

24 mark it.

25 THE COURT: Mark it as an exhibit for

identification. We will do that. When you have done that, will you erase the board?

(Plaintiff's Exhibit 82 marked for identification.)

xxx

(Recess.)

#3

MR. COLIN: Your Honor, as to the chart that was written on the blackboard by Mr. Orseck, I would like to say, sir, that this chart has the effect of presenting to the jury demonstrative proof similar to chart OO, which we offered in evidence and which your Honor excluded. However, this chart written on the blackboard --

THE COURT: Will you erase that so we get rid of it, please.

(The drawing on the blackboard was erased.)

MR. COLIN: This chart is not consonant with the proof of Mr. Edison because it does not give effect to the admitted $50 per unit annual escalation that he assumed in his testimony, and it further includes the year 1977, which was not included in his testimony. There would be a substantial difference resulting from the application of those factors to the total figures shown, and I think, your Honor, that there should be directed to the jury by your Honor an instruction that they are not to consider this evidence and, indeed, to disregard it.

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THE COURT: It is argument.

MR. COLIN: I would ask it be disregarded and that the jury be so instructed.

MR. ORSECK: I believe he said ten times --

THE COURT: I will not instruct them to disregard, but I will instruct them again what both sides have said, and I said this during the course of somebody's summation here: If an argument commends itself to them and has some support in the evidence they may embrace it. If it does not commend itself to them or they find there is not support in the evidence, they should reject it.

MR. COLIN: This was a visual charting in a demonstrative way.

THE COURT: It was a showing of columns of figures to show in a columnar way the way he was arguing his case. I permitted you, frankly -- I specifically authorized you to argue in any way you wished from that chart that you had prepared to this jury. I said you could argue everything in that chart, and I told you you could argue everything in that chart. I excluded it as a document in evidence. I remember distinctly saying that you could argue that chart and its effect to the jury, or anything you wanted to, from Mr. Edison's testimony.

MR. COLIN: I would further say, your Honor,

that the writing by Mr. Orseck on the blackboard showed a $3,000 difference for 1973. Edison's testimony showed that 1973 the rents were different, were equal, and I say there were so many deviations from Edison's proof that this demonstration was highly prejudicial, and I think an appropriate instruction should be given.

THE COURT: I shall instruct generally with regard to counsel's comments on the evidence in summation.

Is there anything else?

MR. COLIN: May I just clarify one understanding: Before the jury retires your Honor will receive objections if so advised after your Honor's charge?

THE COURT: After I have charged I will hear any requests or exceptions that you have which do not duplicate what we did the other day.

(Jury in box.)

THE COURT: Ladies and gentlemen, we are close to the end.

May I thank you at the outset for all the careful attention that I have seen each and every one of you giving to the proof that you have listened to and considered this two weeks' period. I am confident from what I observed that you and each of you are all fully prepared to discharge your final function as jurors here in this case,

which is to decide, as I told you at the outset, the fact issues here.

You are the sole and exclusive judges of the facts in this case.

It is you who will pass upon the weight of the evidence; it is you who will determine the credibility or the believability of the witnesses that you have listened to. You will resolve such conflicts as you find exist in the testimony, if you so find, and you may draw such reasonable inferences as may be warranted by that evidence and documents before you.

I wanted to caution you that you may not and must not speculate, guess, or conjecture. You are to do this on evidence that reasonably commends itself to you and not upon guesswork, speculation or conjecture. I also wish to recall to your attention my statement that upon becoming jurors in this case you do not leave your common sense in the hallway; you keep it with you at all times and apply it at all times.

My function at this point in the trial is to instruct you upon the law that you are to apply in this particular case, given the various alternatives that appear to come from the testimony and the documents that we have before us. It is your duty to accept these instructions

of mine and apply them to the facts as you may find them. In your determination of the facts, you will rely upon your recollection of the evidence. What any attorney may have said to you at any time during the trial or during summation, or what I may have said at any time, or what I may say during these instructions with regard to any matter of evidence or any bit of proof, is not to be taken in place of your own recollection of what that proof actually was. Since it is your recollection that governs, and you should be secure in that recollection, if you have any genuine concern about it, then you may have testimony read to you. Of course, you may ask for and take into the jury room any exhibit or all the exhibits, if you so desire, that have been received in evidence.

Arguments of counsel, I want to point out to you, are not evidence in this case. Mr. Orseck's writing of figures on the blackboard is not evidence. That is argument of counsel. If an argument of counsel, as I said to you earlier today, commends itself to you and it is founded on the evidence in the case, you are, of course, to consider it. If the argument of counsel does not commend itself to you, or is not founded upon the evidence as you find it, you are to reject it.

I must say that just because I may comment

or mention certain matters of proof or evidence does not mean that I regard those matters as any more important than any other evidence in the case. I may use certain evidence as illustrative. You are, of course, to consider all of the evidence in this case in arriving at your conclusions, not just that which the attorneys may have drawn to your attention or that I may draw to your attention in connection with this charge. You are to consider my charge also as an entirety. You are not to focus on one little piece of it to the exclusion of any other part. You are to consider it all as a whole.

What I say to you during the course of this charge is in no way to be taken by you as any indication as to how this case is to be decided, how you are to perform your function, because, as I have said, that job is yours and yours alone, and I have no part in it whatsoever.

Each party appearing before this Court and before you is entitled to a fair and impartial trial, regardless of the size of the corporate parties. All parties, individuals, or corporations, regardless of size, all stand as equals here in this courtroom before you and before the law.

You should not and must not be governed by any sympathy or by any form of prejudice, but you should

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2 reach a just verdict on the evidence and the evidence alone.
3 As I said, you are not to assume that I have any opinion as
4 to the truth or falsity of any claim of any party. The
5 fact that I have denied motions or granted motions during
6 the course of the trial, or ruled on objections one way
7 or the other, is not to be taken by you as any indication
8 that one party is to be believed by me to be more or less
9 reliable than any other party. My rulings on motions were
10 matters of law. My rulings on evidence were matters of
11 law as to which you, as jurors, have no concern. Your
12 determination has to do with issues of fact, and as to
13 that I have no concern.

14 If during the course of a trial a question
15 was asked and there was an objection which I sustained,
16 you are to disregard the question and any alleged facts
17 contained in it. Similarly, if I ruled, as I am sure I
18 did, that an answer was to be stricken from the record, you
19 are to disregard both the question and the answer in your
20 deliberations.

21 This is a civil action in which the plaintiff,
22 Doralee Estates, Inc., seeks to recover a sum or sums of
23 money to compensate it for the injuries and losses which
24 it claims resulted in the alleged wrongful acts of the
25 defendant Cities Service Oil Company, and it seeks punitive

damages as well. In this regard, I want to point out to you that a corporation is in law a person. Of course, obviously, it cannot act otherwise than through its directors, its officers, its employees or other agents. The law, therefore, holds a corporation responsible for all the acts of its directors or officers or employees or other agents done within the scope of their authority. I also want to point out to you, as I did at the beginning, the mere fact that a plaintiff makes a claim against the defendant and has brought a lawsuit does not mean that the plaintiff is entitled to recover. The law states that before a plaintiff can recover at your hands you, the jury, must be persuaded that the plaintiff has proved its claims, proved its right to be compensated by a fair preponderance of the credible, believable evidence.

I, therefore, wish to call to your attention that in a civil case the plaintiff has what we call the burden of proof. This means that the plaintiff must satisfy you, the jury, that it has proved its contentions by a fair preponderance of the credible evidence. This means that you should take all of the evidence in your mind, that which supports the plaintiff's contentions against that which supports the defendant's contentions, and you should then determine which is the more convincing, which is

probably the correct version of the facts, which seems to you to make more sense, which is more likely so than not so. Here, again, we are talking common sense.

This does not mean that you should add up the number of witnesses on each side and actually balance them. The mere fact that one party may have called fewer witnesses, or that one party's case took longer than another party's case is not important in this regard. You, the jury, are not and should not and must not be interested in the quantity of the evidence or the time consumed by any party, but in the quality of the evidence that you have heard.

Which evidence is more likely to represent the true picture of what actually happened?

Should there be conflicting evidence and should it be evenly balanced in your mind so that you are unable to say that the evidence on either side of an issue preponderates, then your finding must be against the party which carries the burden which here is the plaintiff.

That is, if you imagine in your minds the scales of justice -- counsel earlier used that as an illustration -- the party that has the burden of proof must tip those scales slightly in his favor. If the scales remain evenly balanced, or if they go down on the

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2 defendant's side, then the party carrying the burden here,
3 the plaintiff, does not sustain that burden, and the
4 necessity to sustain that burden applies to all the claims
5 in this case. If the burden is not sustained, then you
6 must find against the plaintiff and for the defendant.
7 The facts in this case may be proved by
8 either direct or circumstantial evidence. It must be by
9 one or the other.
10 Direct evidence is where a witness testifies
11 to what he or she saw, heard, or observed; that which comes
12 of the witness' own knowledge; that which comes to one by
13 one's own senses.
14 Circumstantial evidence is where a fact is
15 established from another fact which is properly proved
16 from which one may logically infer the first fact that
17 is sought to be established. You may infer that on the
18 basis of reason and experience from established fact to
19 the ultimate fact to be proved. Let me say that circum-
20 stantial evidence, if you credit it, has no less value
21 than direct evidence.
22 Let me give you an example; I can't remember
23 when the courts didn't use.
24 Let's assume this morning when you came into
25 the building the blinds were drawn, and as you sat here

you could not see out the window. When you came into the building the sun had been shining. A half hour after coming in you look at the door and you see a person coming in with a raincoat, or drops of water on his shoulder, and he is brushing the rain off the shoulder. You see another person coming in with an umbrella and he is shaking the water off the umbrella. What you saw, the people coming in, what they did, was direct evidence because you observed it with your own senses and you looked at it.

That fact, however, is circumstantial evidence from which you can conclude that since you came into the building outside the sun had stopped shining and it had begun to rain. That's all there is to circumstantial evidence. You take one fact and you may infer from it a second fact that logically and reasonably follows.

May I say that even though the testimony of the witness before you may be uncontradicted, you are not compelled to accept that testimony. You may accept it or you may reject it, depending on whether or not it commends itself to you, taking into account, among other things, the demeanor of the witness on the stand, the impression he or she made upon you as I will instruct you more fully hereafter.

Before getting into the plaintiff's claim and

any legal theories in any detail, let me discuss with you one of your major functions in deciding the facts which is to determine the credibility or believability of witnesses who have testified here before you, and to determine the weight to be accorded to those witnesses' testimony.

You have heard quite a bit of testimony in this case. Some of it is in conflict. How do you resolve the conflicts that you find? How do you determine the weight to be given to the testimony of various witnesses? How do you determine if they are credible?

Among other things in your search for the truth you are to use your everyday common sense. You have seen the witnesses that have taken the stand and you have heard their testimony. You have observed their demeanor. How did each impress you? Did the witness appear to be testifying frankly, candidly, and fairly?

In other words, in evaluating the testimony and believability of a witness you apply your common sense and experience precisely as you do in determining an important matter in your own life. You should consider, as I am sure you will, the witness' demeanor, his or her background, his candor, his lack of candor, possible bias, means of information, and accurancy of recollection. You should consider whether a witness' testimony is supported or

whether it is contradicted by other credible evidence and circumstances in the case.

The testimony of a witness may fail to conform to the facts as they occurred because he or she is intentionally telling a falsehood or because he or she did not accurately see or hear that about which he or she testified, or because the recollection of the event is faulty, or even because he or she has not expressed himself or herself clearly in giving the testimony.

You are entitled to consider the possibility that where a witness is called on to testify long after an event and at great length, inconsistent statements may be the result of an innocent mistake or lapse of memory rather than a deliberate intention to falsify or shade the facts.

In short, it is not unusual in lengthy proceedings to utter inconsistencies at some stage along the line.

If your consideration of the evidence makes it appear that there are different versions of the facts resulting in the discrepancy in the evidence, you will have to consider whether the apparent discrepancy involves understandable error which can be reconciled by fitting the two stories together in a rational relationship. However,

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if you believe that is not appropriate or possible you will then have to determine which of the conflicting versions you will accept.

You may, if you wish, accept so much of the testimony of the witnesses you deem true and disregard that which you feel is faulty or mistaken or unclear. You are at liberty, if you deem it proper under all the circumstances to do so, to disbelieve testimony in whole or in part, even though it is otherwise not impeached or contradicted.

Mrs. Huss, in this case, has an obvious financial interest in its outcome. You may consider that fact in determining the weight and credibility to be given her testimony. You have heard witnesses employed by Cities Service and Monticello. Did that give them an interest in the outcome of the case? You may consider whether that employment is a factor to be considered in evaluating their testimony.

However, I want to say, equally strongly, that the fact that a person has an interest in the outcome of the case does not mean that he or she is not capable of giving a truthful, accurate account of events. It is for you to determine whether a witness' interest has, in fact, affected his or her testimony.

This is perhaps a little repetitious, but if you find that any witness, fact witness or expert as well, has made a material misstatement of fact with the intention of misleading you, you may disregard that portion of the witness' testimony which you do not believe, or you may disregard all of it, or you may accept that part which you feel reliable and disregard the rest.

These are matters for you to apply to the testimony that you have heard and see whether they fit into your deliberations.

In talking about witnesses I want to talk about a special kind of witness, that is, one we lawyers frequently call an expert witness. We had several such witnesses who testified here before you. For example, Mr. Adler gave testimony in a general way about the excavation at the bottom of the ponds, the excavation of stumps. He was not there but he was giving it based upon his experience as he testified in Sullivan County.

Normally, the rules of evidence do not permit a witness to testify to an opinion. The so-called expert witness, however, is an exception to this general rule. An expert is nothing more than a person who has been tendered as one who has become expert in a given profession, and he is therefore permitted to state his

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2 opinion in technical fields as to matters in which he is
3 presumably learned and which are material to the issues
4 of this case. He may also state the basis or the reasons
5 for his opinion.

6 However, ladies and gentlemen, just because
7 a witness is called as an expert, that does not mean you
8 are obliged to accept his opinion or follow his views.
9 Quite to the contrary, you are entitled to accept or reject
10 the opinion evidence given by any expert witness, depending
11 on how you assess his statement, his opinions, and the
12 reasons he gave for them. You and you alone are to decide
13 to what extent you wish to believe or accept or reject the
14 opinion of an expert.

#4 15 Now you will recall that on April 25, 1971,
16 it is undisputed that the parties here appeared in Supreme
17 Court, that is the State Trial Court, in Sullivan County,
18 and settled a lawsuit that was pending there. It was
19 stated in open court, in that lawsuit, in the presence of
20 the parties and the attorneys and the judge, that -- I am
21 reading from the stipulation of settlement which is one
22 of the exhibits in this case - - "This payment of $12,500
23 by the defendants" -- and the defendants in that case were
24 Monticello and Cities Service --"to the plaintiff settles
25 and compromises,and extinguishes, any and all claims that

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the plaintiff has or might have or will have against these defendants for the alleged nuisance and negligence from the date of the purchase of these premises by the plaintiff to the present date, April 25, 1972. That settles, compromises, extinguishes all claims to the present date, April 25, 1972."

The threshold question you must determine here, because it has an effect down the line, is whether an instrument signed by Mrs. Huss shortly thereafter, which was Exhibit 6 and may be looked at and considered by you, as may the prior exhibit in its entirety -- that's an exhibit which she called a form -- whether that exhibit was intended to release the defendant Cities Service for a further period of time, that is up to and including October 24.

The instrument states -- and I am reading from it: This release is specifically limited to all claims in such action for damages for the period commencing with the ownership of the premises involved in such lawsuit by Doralee Estates in 1965 and extends to all claims for damages from that day to and including the 24th day of October, 1972, as specifically set forth in said stipulation and as contained therein.

The defendant Cities Service contends that

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2 the release extends to October 24, as is stated in this

3 instrument, and that it is entitled to the benefit of that.

4 You will recall that Mrs. Huss testified

5 that the October date on the release was a typographical

6 error and that she did not catch that, and that April 24

7 rather than October 24 was the date intended by the parties

8 and the date she had intended should be in there, and the

9 date that she had intended to be in there.

10 I ask you in the questions you shall answer

11 as part of your deliberations, there is one specific ques-

12 tion on that issue which is down on the bottom of the

13 sheet that I am going to give you. That is the question:

14 The date to which the parties intended the settlement

15 agreement release to run? April 24, 1972? October 24,

16 1972?

17 You must answer that because, as I say, it

18 has an effect throughout your deliberations.

19 Doralee Estates has four different theories

20 of liability on the part of the defendant Cities Service.

21 The first theory is that the defendant

22 breached the agreement entered into between plaintiff and

23 defendant and Monticello Gas in April of 1972. That's

24 part of that instrument I read to you, which is the

25 transcript of the hearing before Judge Pitt in the Supreme

Court.

What is the exhibit number? I believe it is Exhibit 60?

MR. ORSECK: The original is Defendant's Exhibit O. It is in the record twice.

THE COURT: Thank you.

The second theory upon which the plaintiff asserts liability is the defendant's conduct in allowing oil to enter the plaintiff's land and waters constituted a private nuisance.

Third, the contention is that the entry of such oil onto plaintiff's land and waters was a trespass.

Fourth, that the defendant's conduct in allowing the entry of such oil was negligent.

The defendant denies all of these contentions and charges both factually and legally, and contends that it took every reasonable step to end the problem, and to that end they point to the fact that they even closed the plant down.

Now I shall instruct you as to the elements of the law in these areas. Depending on how you ladies and gentlemen assess the facts, one or more of these principles may become important to you in your deliberations.

I first wish to note that plaintiff may only

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recover against the defendant Cities Service Oil Company if it may recover at all. Plaintiff did not sue Monticello Gas & Oil Company, or MGO, or make any claims against them. Those latter two are not defendants or parties to this lawsuit, and, as I advised you, the claim by Cities Service against them is no longer before you for consideration.

The evidence in this case indicates that the Monticello Gas & Oil Company and its employees physically operated the bulk oil plant across the highway from the plaintiff's property. While Monticello Gas & Oil may have had possession of the premises, plaintiff may still recover against the defendant Cities Service for nuisance, trespass, negligence, or breach of agreement, as the case may be, for its own acts or omissions, the acts or omissions of the defendant Cities Service.

Plaintiff contends that from the evidence you may find that Cities Service in the April, 1972 agreement undertook to correct the complained-of condition and avoid further injury to plaintiff's property, and urges upon you such language as: The defendants shall submit to the Court plans and specifications for the installation of a system which will be designed as to eliminate the discharge or runoff of any petroleum product from the defendants' premises on the land or lakes of the plaintiff.

Defendant denies this is the import of this agreement, that it undertook any such promise.

If you find that Cities Service undertook to correct the oil spillage in this agreement, then its failure to correct conditions on the premises, if you find that the conditions remained uncorrected, would be conduct chargeable to Cities Service even if you find that Monticello Gas & Oil's conduct was also responsible.

Note also that if you find that Cities Service had undertaken in the April, 1972 agreement to correct the complained of conditions, and further that it failed to prevent further oil spillage and this spillage injured plaintiff, you have then found that defendant has breached this agreement and your verdict must be for the plaintiff on that cause of action. If, however, you find the agreement did not require Cities Service to prevent further oil spillage, or that no further spillage took place, then your verdict must be for defendant on this cause of action for breach of the agreement.

Plaintiff also claims that Cities Service in fact retained control of the premises even though it was leased to MGO and in this regard urges that under its arrangements with Monticello Gas & Oil, Cities Service retained the right to make or approve of any structural

repairs or changes in the premises, and that in fact Cities Service had to give its approval for any changes which were actually made. While taking issue with this, defendant also claims that any changes or repairs which were made had no relationship to the oil spillage and that it had no awareness of the day-to-day operating conditions at the plant.

If you find that Cities Service had retained such control of the property and had awareness of the conditions, then they would remain liable for the conditions on the land.

Thus, I charge you that if you find that Cities Service retained control of the premises and had an awareness of the spillage, it would be liable to plaintiff even if you find the major responsibility for the oil spillage belonged to Monticello or MGO.

Now, as to private nuisance: While land owners in an organized community must suffer some damage, annoyance, and inconvenience from each other, no one may make an unreasonable use of his land to the material injury of his neighbor's right to use and enjoy that land. When such an unreasonable use is made the law designates it a private nuisance and permits the injured neighbor to recover damages.

A plaintiff seeking to recover damages for private nuisance must show, first, that conduct of the

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2 defendant caused an interference with plaintiff's right to
3 use and enjoy his land; second, that the interference was
4 substantial; third, that defendant's conduct was inten-
5 tional; and, fourth, that defendant's conduct was unreason-
6 able under all of the circumstances.

7 Plaintiff in this case claims that defendant
8 has unreasonably interfered with its use of the land at
9 the bungalow colony by allowing oil to flow or seep from
10 the oil terminal through an intervening ditch culvert and
11 swamp into the ponds on plaintiff's property.

12 Defendant denies that its conduct caused any
13 interference, denies that there had been any interference,
14 and says that its use of its own property has at all times
15 been reasonable. The burden of proving all of the elements
16 of private nuisance that I have outlined for you is on
17 plaintiff, as I said earlier.

18 Unless you find there was an interference with
19 plaintiff's right to use and enjoy its land, which was caused
20 by defendant's conduct -- by this I mean Cities Service' own
21 acts or omissions to act, as I previously charged you --
22 your verdict must be for Cities Service. If you find that
23 there was an interference that was caused by defendant's
24 conduct, then you must consider whether the inconvenience
25 was substantial. To be substantial the interference must

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2 be real and appreciable, not fanciful or petty. The test
3 is not what disturbs or annoys the plaintiff, but whether
4 normal persons living in the locality would be appreciably
5 annoyed or disturbed by the situation. Even though you
6 find that there was an interference with plaintiff's use
7 and enjoyment of his land, if you further find by applying
8 the test that I have given you that the interference was
9 not substantial, your verdict will be for defendant Cities
10 Service. If, however, your finding is that by that test
11 there was a substantial interference, you will next consider
12 whether defendant's conduct was intentional.
13 If you find that the defendant acted knowing
14 that such interference was substantially certain to result
15 from its conduct or became aware that its conduct was caus-
16 ing such interference and nevertheless continued it -- and
17 as to this knowledge plaintiff urges upon you the April,
18 1972 settlement agreement -- your finding will be that
19 defendant's conduct was "intentional." If you find that
20 defendant's conduct was not intentional, your verdict will
21 be for defendant. If you find that defendant's conduct was
22 intentional, as I defined it, you will next consider whether
23 defendant's conduct was, under all of the circumstances,
24 unreasonable.
25 It is in the public interest that each landowner

be left free to make lawful use of his property to the fullest possible extent consistent with the enjoyment by other landowners of the use of their property free from unreasonable interference. Thus whether particular conduct constitutes a nuisance is a question of degree in which the necessity for and the utility and social value of defendant's conduct must be weighed against the gravity of the harm to plaintiff resulting from that conduct. In determining whether defendant's conduct was unreasonable, you must consider all of the circumstances including the character of the neighborhood and location of the properties, the nature and purpose of defendant's use, and its value to the community, the nature, extent, and frequency of the interference with plaintiff's use. No one of these circumstances that I have mentioned is conclusive, but all are to be considered together and in relation to all of the surrounding circumstances. If you find that defendant's conduct was not under all the circumstances unreasonable, your verdict will be for defendant Cities Service. If, however, you find that there was an interference with plaintiff's right to use and enjoy his land, that the interference was caused by defendant's conduct, that it was substantial, was intentionally caused and was unreasonable, as I have defined those terms for you, your verdict will be

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2 for plaintiff on this cause of action.

3 I will take a ten-second break here.

4 (Pause.)

5 On the issue of trespass, one of the plain-

6 tiff's claims, a defendant who, without justification or

7 consent, knowingly pollutes or contaminates the lands of

8 another commits a trespass and is liable for any damage

9 sustained by reason of its conduct.

10 Plaintiff claims that defendant Cities

11 Service certainly after April, 1972, had knowledge that

12 oil spilled on its land would ultimately find its way to

13 the plaintiff's land and waters.

14 Plaintiff further claims that notwithstanding

15 such knowledge on the part of defendant, and after an

16 agreement to cease and desist from causing oil to be

17 spilled, thus allegedly polluting and contaminating the

18 plaintiff's land and waters, the defendant nevertheless

19 permitted this to occur. The defendant denies this.

20 The questions which you must determine with

21 respect to plaintiff's claim against defendant Cities

22 Service for trespass are as follows:

23 First, did the defendant's conduct as I have

24 defined that term cause the oil to enter the plaintiff's

25 land and waters? If after considering all of the testimony

and proof in this case your finding is that the oil was not caused to enter plaintiff's land by defendant's acts or failure to act, your verdict will be for the defendant on the issue of trespass. If in considering that testimony and proof your finding is that the defendant's acts, or failure to act, did cause oil to enter plaintiff's land and water, you will consider whether defendant's acts were "intentional," as I have earlier defined it.

The next question, then, is to determine the matter of the defendant's intent. Intent involves the state of mind with which an act is done. It generally denotes the desire to effect a result. Obviously, if one performs a voluntary act with a desire to effect a result, he is said in law to intend that result. Furthermore, even though the defendant may have had no desire to effect the result -- that is to contaminate and pollute the plaintiff's lands and waters -- if the defendant acts under circumstances known to it which make it substantially certain that the result will follow, the law charges the defendant with intent to accomplish that result.

Therefore, if you find that the defendant did not act with intent, as I have defined it, to cause the oil to pollute and contaminate plaintiff's lands and waters, and you further find either that the defendant did not know

that oil which plaintiff claims was spilled would necessarily pollute and contaminate plaintiff's land and waters, or that even though the defendant might have known, it was not substantially certain that spilled oil would pollute plaintiff's lands and waters, then your verdict with respect to the cause of action for trespass will be for the defendant.

If, on the other hand, you find that the defendant's acts were "intentional," as I have defined them, that is, that the defendant did actually know when it suffered oil to be spilled, that it would be substantially certain that the oil would contaminate and pollute plaintiff's lands and waters, then your verdict will be for the plaintiff on its cause of action for trespass.

With respect to the cause of action for negligence, an owner of land who leases the premises to a tenant for a purpose which the owner at the time of the lease or its renewal knows or has reason to know would involve risk of injury to adjoining land has a duty to exercise reasonable care to prevent such injury. By reasonable care is meant that degree of care which a reasonably prudent owner of land would exercise under the same circumstances.

Negligence is a lack of ordinary care. It

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2 is a failure to exercise that degree of care which a rea-
3 sonably prudent person would have exercised under the same
4 circumstances. It may arise from doing an act which a
5 reasonably prudent person would not have done under the
6 same circumstances, or, on the other hand, from failing
7 to do an act which a reasonably prudent person would have
8 done under the same circumstances.

9 A defendant is not responsible for the
10 consequences of its negligent conduct unless the risk of
11 danger to the plaintiff was reasonably foreseeable. The
12 exact occurrence or precise damages need not have been
13 foreseeable; but damages to property as a result of
14 negligent conduct must have been not merely possible but
15 probable.

16 Defendant Cities Service was bound at all
17 times to act in a reasonably prudent manner. If acting
18 through its officers, directors, employees, managers,
19 agents, or otherwise, defendant Cities Service could not
20 foresee any danger to the plaintiff as the result of
21 Cities Service's conduct, or if Cities Service's conduct
22 was reasonable in the light of which it could foresee,
23 then there was no negligence.

24 However, there is negligence if defendant
25 Cities Service could or should have foreseen damages to

the plaintiff as a result of the defendant's conduct, and if the defendant's conduct was unreasonable in the light of what was foreseeable to a reasonably prudent person.

With respect to the facts in this case, if you find that after the date of the release, April, 1972, the defendant Cities Service permitted spillage of oil on its property, and that it was reasonably foreseeable to a reasonably prudent person that such spillage would result in contamination of the plaintiff's lands and waters, and that such spillage did, in fact, cause contamination or pollution of the plaintiff's property, then you may find that Cities Service is liable to plaintiff for its negligence.

#5 If, on the other hand, you find that there was no oil spillage on Cities Service's property after April, 1972, or that even if there was such spillage defendant Cities Service could not reasonably have foreseen that such spillage would result in pollution of the plaintiff's property, then your verdict upon the cause of action alleging negligence must be in favor of the defendant Cities Service.

One final matter applicable to all three, nuisance, trespass, and negligence: If you find that Cities Service is responsible for oil pollution causing damage to

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2 plaintiff's property by reason of oil spilled after the
3 date of the release in 1972, whichever you find that to be
4 as I already instructed you, it is no defense to Cities
5 Service on the record of this case that some of the oil
6 polluting plaintiff's lands were spilled before the date
7 of the release unless you can determine without speculation
8 or guesswork how much damage was caused by oil spilled
9 before as opposed to oil spilled after.

10 I am not going to marshal or sum up or put
11 together or collect together, ladies and gentlemen, for
12 you the evidence on each side of the case. This has been
13 done by counsel at substantial length. But I do want to
14 say to you that you are to consider all of the evidence
15 in the case, all of the arguments of the lawyers, and that
16 all of the evidence, whether referred to by counsel or me
17 is important for you to consider.

18 If upon all the evidence you find that the
19 plaintiff has sustained its burden of proof on any of its
20 theories, whether nuisance, trespass, negligence, or breach
21 of the April 24, 1972 agreement by defendant, then, ladies
22 and gentlemen, and only then, do you reach the question
23 of damages.

24 If Doralee has failed to sustain its burden
25 of proof on all of these claims, then you are to report a

verdict in favor of defendant Cities Service and proceed no further. If plaintiff sustains its burden on any one or more of its legal theories, you will then consider the question of the amount of damages which flow from the defendant's violations.

The fact that I am instructing you on the law of damages is not to be regarded by you as any view on my part as to who is entitled to prevail, or as to whether damages are to be awarded or not, or, indeed, in any way as to how you are to decide this case. That, as I have told you before, is exclusively your function.

I give instructions on the law of damages solely for your guidance in the event, if upon all the evidence, you find that the plaintiff is entitled to a recovery in some amount.

If you find for the plaintiff on the issue of liability, then I instruct you that Doralee is entitled to recover only such damages, if any, as you find have been established by a fair preponderance of the credible evidence to have been suffered as a direct and proximate result of the alleged wrongful conduct.

Doralee here, as on the issue of liability, has the burden of proof. In sum, the plaintiff must establish the causal relationship between the oil spillage it

claims occurred and the claimed damage or injury to itself that is said to flow from it.

The concept of proximate cause, which you have heard me use, is one which causes in a natural, continuous sequence injury unbroken by any new cause and without which the injury would not have occurred.

The plaintiff cannot recover damages in this suit for any claimed loss of profits in a commercial venture resulting from economic or market conditions, swamp conditions, discharge of wastes by others than the defendant, or any other condition not caused by the defendant. In this regard the defendant urges upon you that you consider Mrs. Huss' testimony concerning some sewerage pollution into Doralee's pond.

In determining damages, if you do reach that question, you must determine whether the 1972 settlement agreement was intended only to compensate Doralee Estates for damages up to April of 1972, as the plaintiff claims, which is before the summer season of 1972, or to October, 1972, after the summer season, as the defendant claims.

A question which I earlier advised you you would have to resolve is the question as to the date of the release.

Doralee is not required to prove the precise

amount of loss which it has suffered. For if you find that a defendant is liable to a plaintiff for damage, the defendant being the wrongdoer, cannot insist that damages be proven with exactness. However, you may not render a verdict which awards an amount of money based upon mere speculation, guesswork, or conjecture.

A person whose property is damaged by the negligent or wrongful act of another is entitled to compensation from such other person for the damages sustained in such a sum as will restore him as nearly as possible to his former position.

The plaintiff may recover lost rents or profits which you find she has suffered. There has been conflicting testimony, which you must resolve, as to whether and for how much less Doralee Estates rented its bungalows than comparable bungalows in the area -- and if the rental was less, whether the cause was the pollution of her ponds by defendant's oil spillage, or some other cause that defendant urges upon you, such as sewerage, the nature of the location, the size of the units, etc.

The plaintiff may also recover the cost of repairs or restoration, in this case the dredging of the ponds or the difference between the value of the land before and after the harm, whichever is less. There is

a conflict in the testimony in this area as to which you must resolve should you reach this issue.

With respect to restoration or repair of the plaintiff's premises, I charge you that the owner of the property damaged by a nuisance has no duty to take measures to prevent further damage in order to minimize the damages.

It is the claim of the defendant Cities Service that the spillage from the offending oil storage depot has been discontinued and the nuisance thereby abated. I charge you that the abatement of a nuisance does not affect the right to recover damages for its past existence, however.

The measure of relief that the plaintiff may be entitled to is predicated upon the situation at the time the case is decided and is not limited by the time of the commencement of the suit.

The plaintiff is not to be denied damages because you may find that its property has not decreased in value if you find that the value of the plaintiff's property would have increased more than it has in the absence of defendant's acts.

Turning, finally, to the question of punitive damages: In the event that you find that the plaintiff is entitled to compensatory damages, you shall consider the

1 issue of punitive damages. In other words, in addition to
2 compensatory damages you may, but are not required to, allow
3 plaintiff punitive damages.
4 I charge you that with respect to punitive
5 damages Cities Service was not liable for such merely
6 because you may have found that Cities Service is liable
7 to the plaintiff for compensatory damages.
8 Punitive damages may be awarded if you find
9 that the acts of the defendant in causing or permitting
10 the damage to plaintiff's property was wanton and reckless.
11 Punitive damages are allowed to punish the defendant for
12 its wanton and reckless acts and thus to deter others from
13 the commission of like offenses. In other words, punitive
14 damages may be awarded to deter this defendant from a
15 repetition of the wrongful act should you so find.
16 In considering whether punitive damages are
17 appropriate here, I will now read to you certain sections
18 of the New York State Environmental Conservation Act for
19 your consideration:
20 "It is declared to be the public policy of
21 the State of New York to maintain reasonable
22 standards of purity of the waters of the State
23 consistent with public health and public enjoyment
24 thereof, the propagation and protection of fish
25

and wild life, including birds, mammals, and other terrestrial and aquatic life, and the industrial development of the State, and to that end require the use of all known available and reasonable methods to prevent and control the pollution of the waters of the State of New York.

"Waters or waters of the State shall be construed to include lakes, bays, sounds, ponds, impounding reservoirs, springs, wells, rivers, streams, creeks," and other bodies here listed not applicable to this case.

"Industrial waste means any liquid, gaseous solid or waste substance or a combination thereof resulting from any process of industry, manufacturing, trade, or business, or from the development or recovery of any natural resources, which may cause or might reasonably be expected to cause pollution of the waters of the State in contravention of the standards adopted as provided herein.

"Other wastes means garbage, refuse, decayed wood, sawdust, shavings, bark, sand, lime, cinders, ashes, offal, oil, tar, dyestuffs, acids, chemicals, and all other discarded matter not sewerage or industrial waste which may cause or might reasonably

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2 be expected to cause pollution of the waters of the
3 State in contravention of the standards adopted as
4 provided herein."

5 Finally, Section 17-0501:

6 "It shall be unlawful for any person, directly
7 or indirectly, to throw, drain, run or otherwise
8 discharge into such waters organic or inorganic
9 matter that shall cause or contribute to a condi-
10 tion in contravention of the standards adopted
11 by the Department pursuant to Section 17-0301."

12 You may not impose punitive damages on a
13 corporation, however, unless a responsible management offi-
14 cial or officials of the company, or the relevant division,
15 either authorized, participated in, consented to, or after
16 discovery ratified the conduct giving rise to such damages.

17 What is a wanton and reckless act? An act
18 is wanton and reckless when it is done in such a manner
19 and under such circumstances as to show heedlessness and
20 an utter disregard of the result upon the rights of others
21 that may flow from thedoing of the act or the manner in
22 which it is done.

23 A person acts recklessly with respect to a
24 result when he is aware of and consciously disregards a
25 substantial and unjustifiable risk that such result will

occur or that such circumstance exists. The risk must be of such nature and degree that disregard thereof constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation.

In determining whether a defendant's acts were wanton and reckless so as to justify an award for punitive damages you may consider whether or not the defendant committed or participated in an illegal act or whether the defendant's conduct was a perverse and obstinate failure to discharge a legal duty. Such conduct on the part of the defendant, if found by you to have been the case, warrants the presumption of a reckless indifference to the rights of others, which is equivalent to intentional misconduct.

In determining whether or not the plaintiff is entitled to recover punitive damages, you may consider whether it entered the 1972 settlement agreement in bad faith, as plaintiff contends, and whether or not the defendant knowingly violated a stipulation made in the Supreme Court of the State of New York in April of 1972.

You may also consider whether or not the defendant is guilty of misconduct so flagrant as to transcend mere carelessness, in which event you may find it deserves punishment more severe than would result from an

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2 award of compensatory damages alone.

3 If you find that the defendant has committed

4 an act or acts of the nature just described, and if you

5 find that such act or acts warrant an allowance of punitive

6 damages, you are to indicate that fact upon the very form

7 which I am going to have given to you and upon its return

8 to me at an appropriate time I shall charge you further.

9 If you find that fact, you will be sent back to deliberate.

10 Now, ladies and gentlemen, my instructions

11 to you are to be taken as a whole, as an entirety. Do not

12 read into them anything that I have not expressedly told

13 you. Consider all the evidence.

14 A word about deliberating: Each juror is

15 entitled to his or her own opinion. Each juror should,

16 however, exchange views with fellow jurors. That is what

17 jury deliberation is all about. Discuss and consider the

18 evidence. Listen to the arguments of fellow jurors, pre-

19 sent your individual views, and discuss the case with one

20 another. Consult fairly and openly with one another in the

21 jury room to reach a verdict based solely and wholly on the

22 evidence, if you can do so without doing violence to your

23 individual judgment. Each one of you must decide the case

24 for himself or herself after consideration with fellow

25 jurors, but you should not hesitate to change an opinion

you may hold which after discussion with your fellow jurors appears erroneous in the light of the discussion viewed against the evidence and the law.

However, if after carefully weighing and listening to all the arguments of your fellow jurors and weighing the evidence, you entertain a conscientious view that differs from others, you are not to yield up your judgment simply because you are outnumbered or outweighed. Your final vote must reflect your individual conscientious judgment as to how this controversy should be decided as to each claim by the plaintiff against the defendant. Your verdict must be unanimous in order to reach a verdict on any claim by the plaintiff against any defendant.

In the course of your deliberations you may, perhaps, desire to have some part of the testimony read, or you may wish to examine exhibits. You may wish to have some portion of these instructions read back to you if you are uncertain as to anything. In such a case, kindly notify the marshal who will be in charge of you, giving him the note and asking him whatever it is that you wish.

Please, in sending a note to the Court, do not state your position on any issue because that is your business and not mine and not these gentlemen's here.

Let me say finally as I get to the close, I

remind you of your oath as jurors, and that is that you would without fear or favor to anyone well and truly try these issues joined between the plaintiff and the defendant and a true verdict give based solely on the evidence and the Court's instructions as to the law. It is important to the plaintiff; it is important to the defendant; it is important to you as citizens, and it is important for justice in this country.

In reporting your verdict to the Court you will say either that it is in favor of the defendant or that it is in favor of the plaintiff on each of the causes of action. If your verdict is for the defendant upon all the causes of action, you need go no further but you will report that. If you find for the plaintiff on any cause of action, you are to determine and report on this form the amount of compensatory damages that you find, assuming you reach agreement thereon. If the plaintiff is or is not entitled to punitive damages as you determine it you are to report back.

Mr. Dorsan will give you this form for your use.

That, ladies and gentlemen, concludes my charge upon the law.

Gentlemen, are there any requests or exceptions?

MR. COLIN: Yes, your Honor.

THE COURT: Ladies and gentlemen, you just stay where you are. We will go into the robing room for perhaps a few minutes.

(In the robing room.)

THE COURT: Mr. Colin, you spoke first.

Keep in mind that if it is something we discussed the other day there is no need to repeat it this time; your position is preserved. I don't want to repeat anything we did.

MR. COLIN: I will try not to.

On the assumption that those specific requests would be reflected --

THE COURT: They are.

MR. COLIN: May we have marked for identification the requests that we filed with you, sir, the original, the supplemental, and No. 14?

THE COURT: Sure.

MR. COLIN: I object to your Honor's charge insofar as you charged in respect of the settlement agreement and your failure in that respect to refer to the fact that the proof is undisputed that the plans referred to in the prior stipulation of settlement as required to be submitted to the Court were, in fact, submitted in a

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timely way.

THE COURT: It is evidentiary and I didn't purport to give all the evidence. I don't know how that omission bears in terms on alleged fairness on anything else I said.

MR. COLIN: It seems to me, your Honor, where you read that portion of the settlement that referred to plans, it suggested that that would be a basis of finding a breach.

THE COURT: I think I read that for an entirely different purpose. I think it was for the date, the date of the agreement, and I read both the original, April, and I read the other one, showing it was October, and I charged the jury that that is what the language was and that it meant exactly what it said.

Your exception is noted.

MR. COLIN: Also, in respect of the settlement agreement, I object to your Honor's reference to the agreement as providing for the correction of oil spillage. I don't believe, sir, that there was an agreement to correct the oil spillage. It was conditioned on approval of the plans by Judge Pitt. There was no proof in this record of such approval, and I do not think there came into being an obligation to correct the oil spillage.

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However, in addition, the settlement agreement contained the option of closing the plant as an alternative to doing any construction, and the proof, again, is not controverted that the plant was shut down. I object to your Honor's failure to charge in this respect.

THE COURT: Your exception is noted.

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MR. COLIN: In respect of the further portions of your charge relative to nuisance and trespass, in respect of each of those alleged claims, your Honor stated that liability could be predicated on omissions or failures to act, and I object to such a charge because I believe that both trespass and nuisance may not be found on the basis of omissions or failures to act but only on the basis of affirmative action.

THE COURT: I think I charged it as whether there was a duty to act.

Your exception is noted.

MR. COLIN: I except to that portion of your Honor's charge where you said that even though MGO possessed and controlled the plant, Cities Service could be liable if aware of the spillage and possessed control over improvements. I don't think, sir, that that would constitute a basis of liability.

THE COURT: Your exception is noted.

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MR. COLIN: In respect of the negligence claim, I object to that part of the charge in which your Honor made reference to the leasing of premises of a nature where the lessor was charged with knowledge that the premises or the use of the premises could cause injury to adjoining premises. I believe, sir, on the basis of this objection, the nature of this premises was not such as to carry notice to a lessor of an inherently noxious or objectionable use --

THE COURT: We have the internal memorandum, Mr. Colin, which, if nothing else, carried that knowledge.

MR. COLIN: I don't think there is anything about an oil terminal properly operated. This is the basis of my objection. An oil terminal properly operated is not of that character.

THE COURT: I know, but you are not looking at those exhibits where they say: We are liable for damages for continued operation here. It is going to cost us this money to fix it. We are under court order to fix it up, all of that.

In any event, your exception is noted.

MR. COLIN: I object to that portion of your Honor's charge where reference was made to the recovery of damages for conditions which resulted in

preventing an advance or an appreciation of property value. There is no claim in this case related to property value. I think that was disavowed.

MR. ORSECK: He is wrong in his premise. I asked --

MR. COLIN: I don't think we have to argue this.

THE COURT: That exception is noted.

MR. COLIN: I except to your Honor's failure to charge in respect to punitive damages that the acts must have been such as were communicated to --

MR. ORSECK: We had this.

THE COURT: Proceed.

MR. COLIN: Your Honor, I find it difficult to cope with interruptions.

MR. ORSECK: I am sorry. I thought I was whispering.

MR. COLIN: The acts must have been such as were communicated to the officers or directors constituting the management. Your Honor's charge was expressed in terms, as I remember it, of being known to a responsible --

THE COURT: Responsible management official or officials. I stand by that. I don't think you have to show that the vice president knew about this or that one of

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2 the members of the board of directors of Cities Service

3 had to know about this. It has to be somebody who is

4 responsible and has some authority to do something about it.

5 We had that here from Langbein and his sending things on

6 to general counsel's office in Tulsa.

7 MR. COLIN: I except to your Honor's reading

8 from the Act concerning --

9 THE COURT: We ruled on that yesterday.

10 MR. COLIN: I except to your Honor's failure

11 to charge in defining reckless and wanton acts, the level

12 of mere criminality --

13 THE COURT: I charged from that case because

14 I had more time to do it overnight. I do not feel it has

15 to be charged that way. I charged New York Penal Law

16 standard, the standard of recklessness, which is contained

17 in that case, which is what the Court of Appeals was em-

18 bracing, it seems to me.

19 MR. COLIN: I except to your Honor's reference

20 in your charge to the question of whether the 1972 settle-

21 ment was made in bad faith. I don't think that question

22 is properly reservable to the jury. I don't think there

23 is any basis in the proof to support that.

24 THE COURT: It seems to me that the evidence

25 here adduced by the plaintiff was designed to show that at

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2 the time the negotiations were going on the oil was being

3 spilled as usual.

4 Am I correct in that? Mr. Hudson was out

5 there days before this settlement was signed and nothing

6 was happening, the jury could find.

7 MR. ORSECK: When he says the issue was not

8 tried -- in the opening statement I said that the plain-

9 tiff was conned into it.

10 MR. COLIN: Hudson was there after the agree-

11 ment.

12 THE COURT: Somebody was there in March,

13 if I remember correctly.

14 In any event, the plaintiff raised that as

15 an issue. I have that recollection. I charged it as an

16 issue.

17 MR. COLIN: I except to your Honor's state-

18 ment and your Honor's reference to the expert witness

19 Adler that he was not there. There was proof that he

20 was at the Doralee premises.

21 MR. ORSECK: But his presence had nothing

22 to do with his expert testimony. It was on the basis

23 that he never saw the lake drained.

24 THE COURT: I will make that clear. I only

25 referred tothe lake. That was only as an example of

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somebody giving expert testimony as to something he didn't see based upon his general knowledge in the field.

MR. ORSECK: He didn't see it.

THE COURT: Reference to the bottom of the lake. I will charge that. I will do it.

Anything else? We have a jury out there. Let's not spend more time than we have to.

MR. COLIN: I except to that portion of your Honor's charge where you refer to misconduct transcending mere carelessness as being a basis -- I think this was in relation to punitive damages. I believe that those words were so related in the charge and they import an improper level.

THE COURT: If they read my charge as a whole it is perfectly all right.

MR. COLIN: In also except to your failure to charge that in respect of --

MR. ORSECK: Are we on requests now?

THE COURT: Proceed.

MR. COLIN: I respect to punitive damages the burden of proof would be in the nature of the criminal burden which would go beyond a reasonable doubt.

THE COURT: You have never given me any charge on that.

MR. ORSECK: It is not the law anyway.

THE COURT: So I have had no chance to pass upon that.

MR. COLIN: I didn't. There is no question about it.

THE COURT: That I decline to do.

MR. COLIN: Your Honor, as to the verdict form, I take exception to the form for a number of reasons.

I believe that the form, in essence, constitutes nothing other than a general verdict form which calls on the jury to subdivide on a legal basis the grounds on which liability is found.

I furthermore think that the form is misleading insofar as it suggests, as it says, if they find liability on the basis of the breach of the settlement agreement they could find punitive damages.

THE COURT: We discussed that yesterday.

MR. COLIN: I object to your inclusion of the breach of the settlement agreement as the first cause of liability.

MR. ORSECK: I would concede if the jury answered yes as to breach of contract and no with respect to the plaintiff's other causes of action that even if the jury said yes to punitive damages we would consent as a

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2 matter of law it is not available.

3 THE COURT: I thought you argued yesterday

4 to me that deliberate failure to comply with the agreement

5 would justify punitive damages.

6 MR. ORSECK: That's correct.

7 THE COURT: It seems to me that that is

8 necessarily so. We will cross that bridge as and when

9 we come to it.

10 Your exception is noted.

11 MR. COLIN: May I ask that all exhibits be

12 given to the jury.

13 MR. ORSECK: Consented to.

14 THE COURT: I will give the jury what they

15 ask for.

16 MR. COLIN: The reason I ask for that, I

17 had reference in my summation to a number of documents

18 which I think were highly relevant.

19 THE COURT: I will give the jury what they

20 ask for. They have been told they can have testimony

21 read. I will give them what they ask for.

22 Is that all?

23 MR. COLIN: That's all.

24 THE COURT: Do you have any requests?

25 MR. ORSECK: I believe the record is

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protected as to our exception with respect to your Honor's disallowance of the claim of consequential damages. The record is already protected in that respect.

THE COURT: I think so. I dismissed that claim.

MR. ORSECK: There is no point --

THE COURT: That is protected.

(In open court.)

THE COURT: Thank you for your patience.

Ladies and gentlemen, there are two matters as to which I trust I was sufficiently clear, but in the event I was not I am going to cover them again.

During the course of the charge I charged you that Cities Service could be responsible under certain conditions. Keep in mind that I am not now focusing on this except to talk about this little place. I don't want you to put out of your mind the entire charge. I made the remark that Cities Service could be liable under certain circumstances, either by something it did or by its failure to act under certain circumstances. You may remember I made that observation. Obviously it cannot be liable for any failure to act unless you find that there was a duty to act under those circumstances. I want that to be perfectly clear.

Secondly, in referring to Mr. Adler as an example of an expert testifying as to something he did not see, I was using that as an example only, and I repeated this as an example. Mr. Adler, it is clear, did not see the bottom of the lake in question and in testifying as to the bottom of this lake he was given expert testimony based upon his general knowledge of bottoms of lakes throughout the county. It is that to which I have reference to and nothing more.

You are excused.

First, I have the regretful duty of excusing the alternates at this point.

You have been very faithful in your attention, your attendance, your concern, and your presence; I thank you very much on behalf of all of us for your services here as alternate jurors.

You are excused with my thanks.

(Alternate jurors excused.)

(Marshals sworn.)

(At 1:00 o'clock p.m. the jury left the courtroom to deliberate.)

THE COURT: Marshal, there is a form to be given to the jury.

(Pause.)

THE COURT: Two things at this juncture, gentlemen. Will counsel put all in one place the exhibits that are admitted in evidence. I assume that there can be a stipulation that if there is any request for any exhibit it may be given to the jury without the necessity of assembling everyone.

MR. LIDDLE: As soon as they have been checked, your Honor. The exhibits have not been in the possession of the clerk. They are in our possession.

THE COURT: That's why I want you to get them all together.

Secondly, it seems to me that I assume it is agreeable that if the jury asks for any exhibit or all of them that that note may be honored by the clerk without the necessity of any of us attending.

MR. COLIN: That is agreeable to the defendant.

MR. ORSECK: And to the plaintiff.

THE COURT: Next, I would think that we can safely absent ourselves until a quarter past two for lunch.

(Luncheon recess.)

- - -

(At 3:00 p.m. the following proceedings took place.)

THE COURT: We have a verdict here subject to confirmation by the forelady. The jury finds for the plaintiff on each of the causes of action compensatory damage in the sum of $60,000, and it states that the plaintiff is entitled to punitive damages.

Given that I will have the jury recalled and, of course, make this a proper matter on the record. Then I would assume that the jury at that point be given proof of the net worth of the defendant.

After that proof is offered, I will permit you to argue further in any way you feel it is appropriate. Nothing obviously extensive, but something that bears upon this particular issue and the applicability ofthe new fact that has been adduced.

I would then charge the jury that they may now consider the net worth of the defendant in determining what is the appropriate award of punitive damages under the factual circumstances.

Does anybody have any argument with me on that other than what you may have argued with me about earlier on this issue?

MR. ORSECK: That is satisfactory to the

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plaintiff.

MR. COLIN: I have no argument other than that which was advanced, your Honor.

MR. ORSECK: You didn't read to us the date of the release.

THE COURT: April 24.

You have some evidence which you are going to put in which is undisputed.

(Jury in box.)

THE COURT: Ladies and gentlemen, I have received your verdict form, which I have marked as Court Exhibit 3.

xxx (Court Exhibit 3 marked.)

THE COURT: Mr. Dorsan will confirm with you in the appropriate manner the facts that are contained on that.

THE CLERK: Members of the jury, listen to your verdict.

Question 1: We the jury say we find a verdict on the cause of action for breach of the settlement agreement for plaintiff.

We the jury say we find a verdict on the cause of action for nuisance for plaintiff.

We the jury say we find a verdict on the cause

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of action for trespass for plaintiff.

We the jury say we find a verdict on the cause of action for negligence for plaintiff.

The date to which the parties intended the settlement agreement release to run? April 24, 1972.

If the verdict is for defendant on all causes of action disregard the following. If it is for plaintiff on any cause of action, complete the following.

We find the plaintiff is entitled to compensatory damages in the amount of $60,000.

The plaintiff is entitled to punitive damages, and so say you all.

(The jury nodded affirmatively.)

THE COURT: Poll the jury.

(The jury was polled.)

THE COURT: Ladies and gentlemen, at this point we will take further proof and then having taken further proof you will be asked to retire and consider the question of amount, if any, of punitive damages.

MR. COLIN: Will your Honor entertain motions at this point or do you intend to --

THE COURT: I think I can reserve all motions until we are through with the entire thing.

MR. ORSECK: The plaintiff would offer in

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evidence the document handed to the clerk which has been marked arbitrarily Plaintiff's Exhibit 87.

(Plaintiff's Exhibit 87 marked for identification.)

xxx

THE COURT: Do you have any objection to the authenticity of this?

MR. COLIN: No, sir. I furnished it.

THE COURT: Under the legal guidelines we discussed, do you have any objection to it, assuming those legal guidelines govern?

MR. COLIN: I have the same objections I have heretofore expressed to your Honor.

THE COURT: Come to the side bar.

(At the side bar.)

THE COURT: What does this show?

MR. ORSECK: The net worth is one billion 800 thousand.

THE COURT: That's their assets. What are their liabilities?

MR. ORSECK: Your Honor, that's the net worth, I believe.

MR. COLIN: I will give you that.

THE COURT: I think what we ought to do is to stipulate what the net worth figure is, unless I hear to

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the contrary.

MR. COLIN: This is it.

MR. ORSECK: Yes. That's the net worth figure.

THE COURT: Let's stipulate that that's what the parties agree to under the circumstances.

MR. COLIN: I don't agree to a disclosure of it at all. In terms of correctness that is factually the disclosure as of the date of this balance sheet, the end of 1975.

My position on this is that it is not proper under New York law to make an explicit disclosure of --

THE COURT: We argued that already.

MR. COLIN: I continue my offer to stipulate that the company is able to respond to damages in any amount.

THE COURT: I understand that. We have already passed that. We argued that before.

Mr. Liddle, do you have some authority on it?

MR. LIDDLE: Here it is (indicating).

MR. ORSECK: I gave it to the Court in photocopy both ways.

(Pause.)

MR. ORSECK: It says there is a conflict of authority in New York. It is the same judge that decided

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it both ways. There is no appellate case.

THE COURT: The case we saw was an Appellate Division case. I will go out on that basis.

Given the fact that I am going to allow them to consider the net worth of the defendant in this case, which is what that case provides, can we stipulate that that is the figure and give them the figure? It seems to me --

MR. ORSECK: I am willing to do it.

MR. COLIN: I must except to your Honor's ruling.

THE COURT: If it is not acceptable to you the exhibit is admissible.

MR. COLIN: What do you propose is acceptable to me without --

MR. ORSECK: To me my legal rationalization is this: It is either right or it is wrong. If it is right the whole thing is admissible. If it were not admissible it would be just as wrong to read --

THE COURT: Mr. Orseck, the authority I am relying on says that the jury is to be told the net worth of the defendant, and the net worth, I gather, is one billion 336 million, certified by the accountants Peat, Marwick, Mitchell as of December 31, 1975. They may take

that figure into account in determining punitive damages.

(In open court.)

THE COURT: Ladies and gentlemen, in accordance with the stipulation at the side bar it is stipulated that Peat, Marwick & Mitchell, Certified Public Accountants, certified that as of December 31, 1975 the net worth of Cities Service Oil Company is $1,336,035,000.

Is there further proof that either side wishes to introduce?

MR. ORSECK: The plaintiff rests on the issue of proof with respect to punitive damages.

MR. COLIN: The defendant rests, your Honor.

THE COURT: Mr. Colin, do you wish to address the jury on this issue?

MR. COLIN: May it please your Honor and ladies and gentlemen of the jury:

You have seen fit to enter a verdict in this case compensating the plaintiff for the damages that you have found. I am sure you have evaluated those damages in light of all the proof, in light of what this property cost the plaintiff, and have arrived at this verdict with all those factors in consideration.

Now you are called on to determine what sum in relation to the facts that you heard will persuade or

induce Cities Service to be a good citizen and not do what you have found it to be responsible for. In that connection I ask you to review the involvement of Cities Service in all the events of this case where you may find that it did horrendous, reckless, awful things, or whether you find that it didn't, and determine after you evaluate the circumstances in this light whether the facts contain these reckless, awful, and horrendous acts on the part of Cities Service that warrant the imposition of any substantial punitive damages, or whether the damages already awarded contain a sufficient measure of punishment or payment to assure you that Cities Service will, indeed, not repeat what you have found here.

I would suggest also in considering whether there should be assessed any substantial sum of money by way of punishing Cities Service or assuring its performance as a good citizen that you take into account that after Monticello Gas & Oil Company abandoned its operations of this plant in February, 1973, Cities Service Oil Company, at its own expense, removed from one to three feet of earth, carted it away, and brought in fresh, clean fill to replace it; that Cities Service at its own expense dismantled the oil plant and took down the tanks and the oil facilities and left the place in that clean and improved condition.

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2 It has not since that time operated as an oil plant.

3 I think those circumstances of themselves

4 represent a good assurance and a good representation of the

5 awareness and the public conscience of Cities Service in

6 assuring that there would not be a repetition or continuance

7 of those conditions.

8 I say to you that in the evaluation of the

9 question of punitive damages these circumstances should be

10 measured, and you should consider whether anything more than

11 a nominal award of punitive damages merely to convey a

12 message is not more than enough to this company under these

13 circumstances.

14 Thank you very much.

15 MR. ORSECK: If the Court please, I shall try

16 to be as brief as Mr. Colin, though it is difficult to be

17 brief in the undertaking of a task which I feel, and I am

18 sure you feel, is so momentous.

19 The reason it is momentous is the amount of

20 money that Cities Service is worth. They are worth $1,336,000,-

21 000. There was a reason that proof came in afterwards, after

22 you decided the compensatory damage. The reason is that the

23 law doesn't want you to know what somebody's worth is when

24 you are deciding just fair and adequate compensation because

25 the people's wealth have nothing to do with it and youhave

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2 decided that issue fairly.

3 Now we come to punitive damages and the Judge

4 is going to charge you very briefly on that. Punitive

5 damages comes from the word punish.

6 I just want to respond to two things Mr. Colin

7 said and then I will take off.

8 He said to credit the $60,000. Nothing doing.

9 You cannot credit that. That was for just and adequate

10 compensation for her loss. There is no punishment in there.

11 If you included punishment in the $60,000 you didn't do it

12 right. That's not what the Judge told you in the charge.

13 The $60,000 was to fairly, justly, adequately compensate

14 her for her loss. That's behind us.

15 Then he said the punitive damages should be

16 nominal. That's preposterous. The purpose of punitive

17 damages is to punish. If it is a little kid or if it is

18 a big oil company, you punish -- or if it is all the oil

19 companies. It has got to hurt. It has got to deter from

20 future acts of the same thing. Isn't that right? Otherwise

21 it is not punishment.

22 Obviously Cities Service, from the proof in

23 this case, cares about one thing and one thing only: dollars.

24 You saw that in the exhibits.

25 We are under a court order; we have an

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obligation; we are not going to do it; let Monticello do it; we better not go up to the Environmental hearing; they will fine us; we should not spend $49,000 for a separator.

Do you remember that? Did you come across that figure? That's what it would have been years back to put in the ditch, but that's small, small money.

Punitive damages has to deter others. You are going to hear it from the Court. It has to warn others. You know who the other oil companies are -- I will not mention them. You see the signs up. You know every one of them. You know what they do. You know how you can punish them. There is no point in me getting down to specifics. I will insult your intelligence. All of you have read the papers. All of you see the news. All of you know what oil spills --

MR. COLIN: Your Honor, I object.

THE COURT: I sustain that.

MR. ORSECK: I think if I spoke any longer I would beat this to death.

The Judge is going to tell you that punitive damages have to hurt the party, otherwise they don't serve a purpose. How are you going to hurt a company that is worth $1,336,000,000. How are you going to warn others not to pollute lakes, streams? How are you going to teach

them to obey the pollution laws of the State of New York?

Ladies and gentlemen, you can do it. All you have to do is go out into the jury room -- I will not suggest a number. I am afraid to suggest a number. I am afraid to do that. It is up to you. It is up to you.

All I know, ladies and gentlemen, is that it has got to be an awful, awful lot of money.

Thank you.

THE COURT: Would the lawyers and Mr. Golden come to the robing room for a minute.

(In the robing room.)

THE COURT: I propose to charge, and I want you to hear this so that you will have a chance to comment on this, as follows:

Now that you have found that the defendant has committed an act or acts of the nature warranting punitive damages, you may award as punitive damages that amount that seems just -- and I underscore the word "just" -- to you by way of punishment to the defendant and as a warning to others committing like offenses.

In fixing punitive damages you may consider the defendant's financial condition since damages which would be exemplary when inflicted upon a person of moderate circumstances would be trivial and in no practical circumstances

exemplary when imposed upon a person whose property and income is very much larger.

You are in this case entitled to consider the evidence of the net worth of the defendant in concluding what damages are punitive in all the circumstances in this case. However, I caution you that while obviously the net worth of Cities Service is great, that alone is not a license or invitation to you to make an unwarranted award.

Any award that you make must be that which seems just and fair as I have earlier charged you and no more.

I propose to charge exactly like that. I obviously reserve the right to reduce any punitive damage award upon motion if, as a matter of law, I deem it excessive.

But what are your thoughts with regard to my proposed charge?

MR. COLIN: My thought primarily is that the charge should not state that the net worth of the defendant should be taken into consideration.

THE COURT: We have passed that. It is before them. The law permits it. It is in evidence. There is no difference in that, frankly, as I think about it, from your saying that you could pay any award that anybody might make except that we have the fact rather than an absolutely open-

ended statement with regard to an oil company's assets.

But, in any event --

MR. COLIN: My other objection, sir, is you are giving the jury a charge that they may assess a greater amount of punitive damages against a wealthy defendant than they would against one not --

THE COURT: I do not think that I am saying that. I am saying that they may consider the circumstances of the party in dealing with what is, in fact, punitive, because something that might be trivial to one might be quite harsh upon another.

MR. COLIN: I would suggest that it might be appropriate to charge that punitive damages should be evaluated in the context of the situation, the scope of the situation.

THE COURT: I thought I have, but I will be more specific about it. I did propose to charge in considering damages they should consider all the circumstances of this case.

I will add language here if you will suggest it to me.

MR. COLIN: Include the fact that the case is local rather than widespread in nature.

THE COURT: I don't know what that means. That

doesn't really apply to it. I was thinking you had in mind in terms of saying the circumstances of the spill that they found, the efforts that were made to close up the plant, and so on and so forth --

MR. COLIN: What I have in mind, sir, really is the fact that right now we really are at a very unfortunate time in respect of oil spills. We have these ocean tankers in substantial number involved in spills and break-ups. I think that it would be appropriate that the jury be told that the situation involved here has only the implications represented by spilling oil in that way, in that place, with that effect, and that they are not to consider any greater form of spillage or pollution beyind the facts.

THE COURT: I have to tell them this is not polluting the Atlantic Ocean.

MR. ORSECK: I understand, but I did believe that this is oil spillage and all it is is a question of degree. I think that the purpose of punitive damages is to prevent oil spills of any kind.

THE COURT: I have in mind to add to my statement that you are to consider what is punitive in all the circumstances of this case the following language:

Keep in mind that we are dealing here with an oil spillage and defendant's conduct as revealed on this

record. You are not to go beyond that consideration.

MR. COLIN: That's sort of in line.

THE COURT: With what you had in mind?

MR. COLIN: Yes, it is.

THE COURT: I will charge accordingly.

All right.

MR. COLIN: May I remind you that after you charge we will have to enter exceptions again.

THE COURT: When all the questions are determined -- no, no. Please.

MR. COLIN: Won't we have to --

THE COURT: I will give exactly what you heard here. If you want to take exception to some part of this-- it is only four paragraphs. That's the reason I have you here now.

MR. COLIN: I am mindful of Rule 51. I think it requires that after the actual charge is given exceptions are to be noted.

THE COURT: Do you want to note the exceptions now?

MR. COLIN: If it is stipulated that exceptions noted now will be deemed to have been made after the giving of the charge, that's all right. I am merely trying to conform with the rule.

pgem

MR. ORSECK: That is agreeable.

THE COURT: What position do you take? What exception do you take to any part?

MR. COLIN: The exception I take, as previously noted here, is to your charge that a different measure of punitive damage may be found as to a wealthy person as against one less wealthy, and that they may give consideration to the worth of the defendant.

THE COURT: That exception is noted.

Is it stipulated, Mr. Orseck, that these exceptions are deemed tohave been noted after --

MR. ORSECK: Yes.

(In open court.)

THE COURT: Ladies and gentlemen, obviously there is but one question remaining to you in this case, and that is to determine in dollars and cents what you conclude is the appropriate punitive damage award. To that end I am going to give you some brief instructions on the law as follows:

Now that you have found that the defendant has committed an act or acts of a nature warranting an allowance of punitive damages, you may award as punitive damages that amount that seems just. I repeat: that amount that seems just to you by way of punishment to the defendant

pgem

and as a warning to others against committing like offenses.

In fixing punitive damages you may consider the defendant's financial condition since damages which would be exemplary when inflicted upon a person of moderate circumstances would be trivial and in no practical sense exemplary when imposed upon a person whose property and income is very much larger. You are entitled, therefore, to consider the evidence of the net worth of the defendant in concluding what damages are punitive in all the circumstances of this case.

Keep in mind that we are dealing here with the oil spillage and defendant's conduct as revealed on this record, in this case, and you may not go beyond that in your consideration.

I caution you that while obviously the net worth of Cities Service is great, that alone is not a license or an invitation to you to make an unwarranted award. Any award that you make must be that which seems just and fair, as I have earlier charged you, and no more.

You may now retire and consider further.

(At 4:00 o'clock p.m. the jury again left the courtroom to deliberate.)

(At 4:20 p.m. the following proceedings took place:)

pgem

THE COURT: This note says: $200,000.

Mark that as an exhibit.

xxx (Court Exhibit 4 marked.)

(Jury in box.)

THE COURT: I haveyour note. It is now Court Exhibit 4. In this exhibit you report that your verdict as to punitive damages is in the sum of $200,000.

I will have the clerk, Mr. Dorsan, confirm that in due form for the Court's record.

(The jury was polled.)

THE COURT: Is there anything else?

(Pause.)

THE COURT: Ladies and gentlemen, you have come to the end of two weeks of full, hard, careful thought of jury service. I want to express my appreciation to you for truly being ministers of justice, for your careful attendance, your careful attention, your careful consideration of the issues. You are excused from this service with my thanks. I appreciate the fact that you have come here and served in this capacity.

Thank you very much.

(Jury excused.)

(Short recess.)

(At 4:40 p.m. the following proceedings

pgem

took place:)

THE COURT: Mr. Colin, you have motions?

MR. COLIN: I would ask initially, your Honor, that this paper which was returned by the jury with the exhibits, but which is not itself an exhibit, be marked for identification because I think it is significant in respect of the disposition of this case. It will be a court exhibit, of course. The paper has on it the self-same figures that were written on the blackboard by Mr. Orseck, to which I made protest during the course of his summation.

(Court Exhibit 5 marked.)

xxx MR. COLIN: Have the requests to charge been marked? May we assume that they have been assigned certain numbers, meaning the original requests, the supplemental requests, and the one marked No. 14?

THE COURT: All right.

(Court Exhibits 6, 7, and 8 marked.)

xxx MR. ORSECK: This document is what?

MR. COLIN: This document meaning the one that was just marked. There it is (indicating).

MR. ORSECK: That's the jury's calculations.

MR. COLIN: This document was handed back by the jury together with the exhibits which were before

pgem

them. I point out what I have already indicated to the Court.

MR. ORSECK: I want to make it clear that I thought there was an implication that that had been given to the jury.

MR. COLIN: No, no. I merely say that when the exhibits were returned that document came out with them.

Your Honor, we move to set aside the verdict both as to compensatory and punitive damages and for judgment NOV.

THE COURT: Let's stick with the compensatory for a moment.

What is the basis of the motion for the compensatory?

MR. COLIN: The basis is that it is contrary to the law and the evidence.

I assume your Honor doesn't want me to go into that --

THE COURT: Unless you have something specific to urge upon me I don't.

Do you have something specific in the way of life of the trial judge? By giving it to the jury I obviously made the determination that there is evidence to support what they find, what is open to them to find. They

did find in my judgment within that evidence. If you want to urge upon me something --

MR. COLIN: I don't want to urge anything in addition to what I have already presented to your Honor in the course of the trial.

I believe on the law it should not have been given to them, and I don't want to repeat in effect what I have already presented for your Honor's consideration.

THE COURT: I will deny the motion to set aside the verdict and for a new trial or whatever.

MR. COLIN: Or Judgment NOV?

THE COURT: Yes, as to the jury's findings with regard to liability for compensatory damage and the amount of such compensatory damage.

MR. COLIN: I make the same motion with respect to the punitive damages.

THE COURT: There I will entertain that motion to the extent you want to give me authorities that bear upon it.

MR. COLIN: At this time?

THE COURT: I will give you time to do that on paper.

MR. COLIN: How much time?

THE COURT: I am not doing any more than

pgem

giving you the right to move against it on the record so that I can consider it and your adversary would have the ability to respond. If you wish to make a motion before me on paper so you can argue the punitive damage amount, which is what I think is the only thing that would be open to question at this time, we will consider that fact.

MR. COLIN: My motion was not directed to excessiveness but rather to the finding in toto. I do think that both awards are excessive.

THE COURT: I would deny the motion to the extent that the jury could not find it on this record because on this record I think the jury could find punitive damages. Whether or not the amount of damages the jury determined is appropriate on the entire record, I would be willing to consider that on a properly submitted motion and I give you leave to submit, if you desire.

MR. COLIN: That would be without prejudice to our contention that punitive damages should not --

THE COURT: Without any question.

MR. COLIN: Yes, sir. Thank you for that leave, sir.

There is a little housekeeping matter that I have on my notes, your Honor, and that is this: The exhibits that were redacted by direction of your Honor

pgem

were marked not in the original document with overlays or strikeouts but were marked in the form of Xeroxes, so that we don't have available in the record, because this was done, the original document; and, of course, as you may recall, I expressed objection to certain editing aspects of the documents as directed by your Honor, so I would like to do what I can to be assured that there will be available as part of this record the original documents so that the redaction directed by your Honor can be in relation to the original document.

THE COURT: There is no question that you should have that right.

Mr. Orseck, I don't know how to work that out. I am sure you and Mr. Colin can get together.

MR. ORSECK: There is no problem about that.

MR. COLIN: Maybe we can have the original paired with the exhibit as redacted and marked so that the record will have available the original as well.

MR. ORSECK: We will furnish him with such a set.

I have one motion, your Honor. I have two motions.

The first is to conform the pleadings to the proof so that the complaint jibes with the questions

answered by the jury. I think it has already been done.

THE COURT: To the extent that it has not been the motion is granted.

MR. ORSECK: The other motion is this: I would request the direction to the clerk to enter judgment and that entry contain a direction that the $60,000 bears interest from the date of the complaint, that being a property damage action. We are entitled to that as a matter of statute.

THE COURT: You are going to prepare a judgment for me to sign, are you not?

MR. ORSECK: Yes, sir, we will do that.

THE COURT: Put that in there.

MR. COLIN: I think ordinarily that goes to the clerk. I think the entry --

MR. ORSECK: The Court certainly has the authority to sign it.

MR. COLIN: Of course it does, but procedurally, ordinarily, the judgment goes to the clerk. I think the judgment is entered by the clerk, if I remember the rules. The clerk prepares and enters the judgment.

THE COURT: You submit a judgment. If there are any questions --

MR. COLIN: I would like tohave the judgment

pgem

submitted on notice to me.

THE COURT: And put in a letter if you have any concern about date when it should be and why it should be, and give me the case.

MR. COLIN: Your Honor, just another housekeeping matter: We do not have copies of the plaintiff's exhibits or at least many of the plaintiff's exhibits. I think that we should be furnished with them promptly. I think it is important to us in evaluating our further course to have those exhibits and, in effect, to have the full record available.

MR. ORSECK: Aside from the pictures I almost resent it. We went to the trouble before the case started to premark all the exhibits. We furnished your Honor with a full set. We furnished Mr. Colin with a full set. The only thing he doesn't have is some of those Polaroid pictures.

THE COURT: Gentlemen, let us go off the record.

(Discussion off the record.)

MR. ORSECK: If there is anything you don't have, write to us and we will send it by return mail.

THE COURT: Is there anything else?

MR. COLIN: That's all I have in mind, your Honor.

pgem

THE COURT: Good night, gentlemen.

(Time noted: 4:50 p.m.)

- - -

WITNESS INDEX

Name	Direct	Cross	Redirect	Recross
Robert Rosch	27	39	54	56
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"Leroy C. Langbein	153			
Matthew Peter Motl	177	188		
"John Kwak	213			
Sam Greene	248	275		
Leroy C. Langbein	280	308	323	325
William Edison	329	346	409	
"Joseph G. Spodaryk	415			
Dora Huss	458 958	510 969	744	
Susan Diane Wissner	752			
William J. Rieber	757	796	814	815
Alvin Adler	819	845	889	891
Jeffrey L. Liddle	893			
Alvin Adler	949	951	954 956	954
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EXHIBIT INDEX

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40,43 through 63		473
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66		746
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BB		736
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KK	789	
LL	789	

EXHIBIT INDEX

Defendants	Identification	In Evidence
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C	355	
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E	403	
F	404	796
G	404	
H	405	
I	405	
J	406	
K	407	
L	407	
M	407	
O	543	543
W	702	
X	706	
S	716	717
KK		794
NN		881

COURT'S EXHIBIT 1 - QUESTIONS TO BE GIBEN TO JURY AFTER TRIAL UNDER F.R.Civ.P. 49(a)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
- X

DORALEE ESTATES, INC., a New York Corporation,

Plaintiff,

-against-

CITIES SERVICE OIL COMPANY, a Delaware corporation,

Defendant and Third-Party Plaintiff,

-against-

MGO Corp. and MONTICELLO GAS & OIL CO., INC.,

Third-Party Defendant.

- X

73 Civ. 907

QUESTIONS TO BE GIVEN TO JURY AFTER TRIAL UNDER F.R.CIV.P. 49(a)

1. Did plaintiff release the defendant from all claims for damage through October 24, 1972?

Yes_____ No_____

2. Who operated and controlled the oil terminal in the period October 25, 1972 until operations terminated in February 1973?

a) Cities Service Oil Company _____

or

b) MGO Corp./Monticello Gas & Oil Co., Inc. _____

3. Did the manner in which the oil terminal was operated in that period cause damage to plaintiff?

Yes_____ No_____

4. If your answer is "Yes", did this result in reduction in plaintiff's rent income for the period October 25, 1972 to February 28, 1973?

Yes_____ No_____

5. If your answer is "Yes", how much was the reduction in rent income in that period?

$_____

6. Was there any intentional or malicious desire to injure the plaintiff?

Yes_____ No_____

7. If your answer is "Yes", by whom?

a) Cities Service Oil Company_____

b) MGO Corp./Monticello Gas & Oil Co., Inc. _____

8. Were acts intentionally done which resulted in release of oil which entered plaintiff's premises?

Yes_____ No_____

8a. If so - by whom?

a) Cities Service Oil Company_____

b) MGO Corp./Monticello Gas & Oil Co., Inc. _____

9. Did plaintiff suffer damage by reason of acts done which a reasonably prudent party would not have done or by reason of failure to do acts which a reasonably prudent party would have done?

Yes_____ No_____

9a. If your answer is yes, who performed the acts or failed to perform same?

10. State percentage for which you fix responsibility for performing acts or failing to perform same?

a) MGO Corp./Monticello Gas & Oil Co., Inc. _____%

b) Cities Service Oil Company _____%
[these must total 100%]

Dated: January , 1977

_____
Foreman

COURT'S EXHIBIT 2 - JURY NOTE

USA 32-4/75
(F.D. 4-23-71)

Rec'd 8:20 p.m.
COURT'S
EXHIBIT
U. S. DIST. COURT
S. D. OF N. Y.

2

FPI-MI—3-26-76-25M-531E

1/14/77

— send in all the

Nina Gladstein

1/14/77

Please send in all the

evidence —

Nina Gladstein

COURT'S EXHIBIT 3 - VERDICT FORM

USA 33s-4703
(ED. 4-28-71)
Rec'd 3:05
Court
EXHIBIT
U. S. DIST. COURT
S. D. OF N. Y.
3
FPI-MI—3-26-76-25M-5515

VERDICT FORM

states, Inc. v. Cities Service Oil Company

say we find a verdict on the cause of action
the settlement agreement for

ntiff ✓ (Check one)
ndant _____

say we find a verdict on the cause of action
or

Plaintiff ✓ (Check one)
Defendant _____

We the jury say we find a verdict on the cause of action for trespass for

Plaintiff ✓ (Check one)
Defendant _____

We the jury say we find a verdict on the cause of action for negligence for

Plaintiff ✓ (Check one)
Defendant _____

The date to which the parties intended the settlement agreement release to run?

April 24, 1972 ✓ (Check one)
October 24, 1972 _____

If the verdict is for defendant on all causes of action, disregard the following. If it is for plaintiff on any cause of action, complete the following:

We find the plaintiff is entitled to compensatory damages in the amount of $ 60,000

The plaintiff is ✓ entitled to
is not _____

punitive damages (Check one. Do not enter any dollar amount).

VERDICT FORM

Doralee Estates, Inc. v. Cities Service Oil Company

We the jury say we find a verdict on the cause of action for breach of the settlement agreement for

Plaintiff ✓ (Check one)
Defendant _____

We the jury say we find a verdict on the cause of action for nuisance for

Plaintiff ✓ (Check one)
Defendant _____

We the jury say we find a verdict on the cause of action for trespass for

Plaintiff ✓ (Check one)
Defendant _____

We the jury say we find a verdict on the cause of action for negligence for

Plaintiff ✓ (Check one)
Defendant _____

The date to which the parties intended the settlement agreement release to run?

April 24, 1972 ✓ (Check one)
October 24, 1972 _____

If the verdict is for defendant on all causes of action, disregard the following. If it is for plaintiff on any cause of action, complete the following:

We find the plaintiff is entitled to compensatory damages in the amount of $ 60,000

The plaintiff is ✓ entitled to
is not _____

punitive damages (Check one. Do not enter any dollar amount).

COURT'S EXHIBIT 4 - JURY NOTE

USA 88-175
(SDNY. 4-28-71)

COURT
EXHIBIT
U. S. DIST. COURT
S. D. OF N. Y.

4

FPI-MI—3-26-76-25M-5315

Punitive Damage —

1,000,00

Nina Ahuchai

Punitive Damage —

$200,000.00

Nina Ahuchai

COURT'S EXHIBIT 5 - JURY NOTES

COURT'S
EXHIBIT
U. S. DIST. COURT
S. D. OF N. Y.

5

FPI-MI—5-26-76-25M-6315

22,000
10 000

32000

~~9,000 32000~~

30,000 rent

50,000

6
10
~~25~~
35

32,000
18000
50000

1 BILLION

1 MILLION

250,000

250 000

200 000

250,000

200

Exhibit 5

COURT'S EXHIBIT 6 - DEFENDANT CITIES SERVICE OIL COMPANY'S SUPPLEMENTAL REQUESTS TO CHARGE

Court's 6

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- X

DORALEE ESTATES, INC.,

Plaintiff,

-against-

CITIES SERVICE OIL COMPANY,

Defendant and
Third-Party Plaintiff,

-against-

MGO CORP. and MONTICELLO GAS & OIL CO., INC.,

Third-Party Defendants.

- X

73 Civ. 907 (RO)

DEFENDANT, CITIES SERVICE OIL COMPANY'S SUPPLEMENTAL REQUESTS TO CHARGE

SUPPLEMENTAL REQUESTS TO CHARGE
AS TO THE PLAINTIFF'S CLAIM

10.

The plaintiff herein claims trespass on the basis of a contention that oil was permitted to seep from the MGO Oil Terminal into a ditch from which it is claimed that it ultimately moved through a swamp and into the plaintiff's pond.

Trespass requires proof of acts intentionally causing a substance to enter upon the plaintiff's lands. I charge you that such acts cannot be found to have been committed by Cities Service since it was neither in possession nor in control of the premises from which the oil allegedly emanated.

2 N.Y.P.J.I. 3:8

11.

I charge you that in the instant case Cities Service did not occupy or control the premises from which the damage claimed by plaintiff emanated and, therefore, Cities Service has no liability in respect to what is claimed by plaintiff.

1 N.Y.P.J.I. 2:116, Comment, at 333 (1974),
Appel v. Muller, 262 N.Y. 78, 186 N.E. 785 (1933),
Pharm v. Lituchy, 282 N.Y. 130, (1940).
Patterson v Stoney
Collemp v Goetz
Potter v N.Y.O.&W. Ry Co.
261 N.Y. 489 (1933)

12.

The fact that a prior lawsuit between the parties was settled must be completely disregarded by you in determining liability in this lawsuit, and I instruct you that you are to give no weight or consideration to the prior settlement or acts taken pursuant thereto in your deliberations relating to liability herein.

I point out, however, that the prior settlement, and the release given by the plaintiff to the defendant, has the effect of relieving and absolving defendant of any liability to the plaintiff for the period prior to October 24, 1972.

7 R Civ Proc 408

COURT'S EXHIBIT 7 - DEFENDANT CITIES SERVICE OIL COMPANY'S AMENDED REQUESTS TO CHARGE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
- -X

DORALEE ESTATES, INC.,

Plaintiff,

-against-

CITIES SERVICE OIL COMPANY,

Defendant and
Third-Party Plaintiff,

-against-

MGO CORP. and MONTICELLO GAS & OIL CO., INC.,

Third-Party Defendants.
- -X

73 Civ. 907 (RO)

DEFENDANT, CITIES SERVICE OIL COMPANY'S REQUESTS TO CHARGE

1. (Amended)

A plaintiff seeking to recover damages for private nuisance must show, first, that conduct of the defendant caused an interference with plaintiff's right to use and enjoy his land, second, that the interference was substantial, third, that defendant's conduct was intentional, and fourth, that defendant's conduct was unreasonable under all of the circumstances. Plaintiff in this case claims that defendant has unreasonably interfered with plaintiff's use of her land by causing or permitting oil to flow or seep from the oil terminal, through an intervening ditch and culvert and swamp, into

two small ponds on plaintiff's lands. The burden of proving all of the elements of private nuisance that I have outlined for you is on plaintiff. Unless you find that there was an interference with plaintiff's right to use and enjoy her land which was caused by one of the defendants, your verdict must be for defendant. The oil terminal was leased by Cities Service to MGO Corp. and Monticello Gas & Oil Co., Inc. Cities Service was not in possession or control of the premises and did not commit any act or omission thereat which would have caused the conditions alleged by plaintiff. I charge, therefore, that Cities Service can have no liability to plaintiff for damage to plaintiff's premises and I direct you to return a verdict in favor of Cities Service.

2 N.Y.P.J.I. 3:16

2. (Amended)

Because plaintiff has heretofore released Cities Service from liability for any acts or conditions through October 24, 1972, plaintiff may recover damages only for conditions caused after that date. Such damages, if found by you, can only be a nominal amount in view of the discontinuance of oil terminal operations in early 1973 and the action of Cities Service in removing the earth on the surface of the oil terminal and replacing it with clean material.

3.

In evaluating the claim asserted by plaintiff you may give consideration to claims on the part of plaintiff that sewage, rather than oil seepage, damaged its property.

4.

In considering whether plaintiff sustained any damage, you may consider the fact that plaintiff collected progressively higher rents and greater total rents, during the period of the condition about which it complains, and expanded its facilities substantially during that period.

5.

Punitive damages are recoverable only for willful, malicious or reckless injury. I charge you that there is no proof of such action on the part of Cities Service and direct you not to find or return a verdict for punitive damages against that defendant.

14 N.Y. Jur. 38 (§179)
2 Devitt & Blackmar 202 (§7811)

6.

Unless the plaintiff has shown by a preponderance of the evidence that Cities Service caused or is responsible for creating a condition resulting in actual proven damage to plaintiff, you should find in favor of Cities Service.

7.

Cities Service was not a party to any proceedings before the New York State Department of Environmental Conservation and is not bound by any findings or directives of that department and you are not to consider any such proof in your evaluation of liability.

8.

Plaintiff is entitled to recover damages only to the extent that it may have suffered a reduction in rental income by reason of conditions proven to be attributable to Cities Service. In the absence of proof of such impairment of rental income, plaintiff may not recover damages. In this connection, you may properly give consideration to proof showing that plaintiff's rental income increased during the period in question.

2 N.Y.P.J.I. 666 (comment),
Woolsey v. N.Y.E.R.R. Co. 134 N.Y. 323, 30 N.E. 387,
Pritchard v. Edison Elec. Illum. Co., 179 N.Y. 364, 72 N.E. 243.

AS TO THIRD-PARTY CLAIM

9.

By reason of the provisions of the lease between Cities Service Oil Company, as landlord, and MGO Corp. and Monticello Gas & Oil Co., Inc., as tenant, the latter two corporations are liable to Cities Service for any liability which may be found on the part of Cities Service to the plaintiff and, in addition, MGO Corp. and Monticello Gas & Oil Co., Inc. are liable to Cities Service for the reasonable cost and expense to Cities Service of defending against the plaintiff's claims and I direct you to bring in a verdict in favor of Cities Service Oil Company and against MGO Corp. and Monticello Gas & Oil Co., Inc. in the amount of any liability found by you on the part of Cities Service to the plaintiff, together with the reasonable cost and expense to Cities Service of defending against plaintiff's claims.

Lease, ¶5 (Compliance with requirements of government authorities), ¶6 (Tenant to make all repairs and maintain premises in good condition), and ¶8 (Agreement to defend, indemnify and save harmless).

COURT'S EXHIBIT 8 - DEFENDANT AND THIRD-PARTY PLAINTIFF'S REQUESTED JURY INSTRUCTION NO. 14

The recklessness that will give rise to punitive damages must be close to criminality, and, like criminal conduct, it must be clearly established. What comes through from a study of these and many other New York decisions is that the recklessness that will give rise to punitive damages must be close to criminality. Error in failing to make what hindsight demonstrates to have been the proper response - even gross error - is not enough to warrant punitive damages.

Further, it must be shown that the officers and directors constituting the management of the defendant authorized, participated in, consented to or ratified the conduct

Roginsky v. Richardson-Merrell, Inc., 378 F.2d 832 (2d Cir. 1967)

Koufakis v. Carvel
425 Fed 2d 892 (2nd cir 1970)

NOTICE OF MOTION TO REDUCE AWARD OF PUNITIVE DAMAGES

GHC:ac
1/19/77

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
- X

DORALEE ESTATES, INC.,

73 Civ. 907

Plaintiff,

-against-

CITIES SERVICE OIL COMPANY,

Defendant and
Third-Party Plaintiff,

-against-

MGO CORP. and MONTICELLO GAS & OIL
CO., INC.,

Third-Party Defendant.
- X

PLEASE TAKE NOTICE that the defendant Cities Service Oil Company moves to reduce the award of punitive damages herein as excessive, on the following grounds:

1. The award of punitive damages is greatly in excess of the penalty imposed by the New York statute for the offense with which Cities Service Oil Company was found chargeable.

2. Consideration should be given to the corrective measures voluntarily undertaken by Cities

Service Oil Company after the plant was vacated by Monticello Gas & Oil Co., Inc.

3. Cities Service Oil Company's responsibility for the pollution is essentially vicarious, since the acts and omissions resulting in the pollution were within the control of Monticello Gas & Oil Co., Inc. as operator of the plant.

4. The amount fixed as punitive damages is disproportionate and excessive in relation to the amount of compensatory damages.

And that the defendant Cities Service Oil Company further moves, pursuant to F. R. Civ. P. 62, for a stay of enforcement of the judgment herein pending the filing and determination of an appeal on the ground that the record herein establishes a net worth of said defendant which assures the plaintiff of recovery of the amount of any judgment herein if said judgment is sustained on appeal.

The motions are returnable on January 27, 1977 at 2:15 P. M. before Honorable Richard Owen, United States

District Judge, in Courtroom 906, for consideration and determination. The movant herein will submit without argument.

You are required to serve answering papers herein so that they will be received by the undersigned not later than 12 Noon on January 26, 1977.

Dated: January 19, 1977.

BAER MARKS & UPHAM
Attorneys for Defendant

By _____
A Member of the Firm
Office & P. O. Address
70 Pine Street
New York, New York 10005
(212) 344-1700

To: GERALD ORSECK, Esq.
Attorney for Plaintiff
Route 52
Liberty, New York

A-1360

DECISION ON MOTION TO REDUCE AWARD OF PUNITIVE DAMAGES

NO. 73 Civ. 907

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

DORALEE ESTATES, INC.,
Plaintiff,

-against-

CITIES SERVICE OIL COMPANY,
Defendant and
Third-Party
Plaintiff,

-against-

MGO CORP. and MONTICELLO GAS & OIL CO., INC.,
Third-Party
Defendant.

ORIGINAL

MOTION AND NOTICE
OF MOTION

BAER MARKS & UPHAM

ATTORNEYS FOR Defendant and
Third-Party Plaintiff
Cities Service Oil Company

70 PINE STREET
NEW YORK, N. Y. 10005
TEL. (212) 344-[illegible]

Memorandum

Attorneys here was Summer to Cities Service to brief the function of expenses of the jury's award of punitive damages, no precedents and cases to my attention which suggest its expense, and inving in mind the record upon which the jury I cannot conclude, based upon answers, that it was as a matter of law, to reduce so stunning, so unusual.

Per Curiam

1/31/77

#101

JUDGMENT APPEALED FROM

Closed

Signed

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------X

DORALEE ESTATES, INC., a New York Corporation,
Plaintiff,

73 CIV 907
Judge Owen

-against-

CITIES SERVICE OIL COMPANY, a Delaware Corporation,
Defendant and Third Party Defendant,

PROPOSED JUDGMENT WITH NOTICE OF SETTLEMENT

#77,244

-against-

MGO CORP. and MONTICELLO GAS & OIL CO., INC.,
Third Party Defendant.
----------X

U.S. DISTRICT COURT FILED FEB 2 1977

This action came on for trial before the Court and a jury, Hon. Richard Owen, United States District Judge presiding, and the issues having been duly tried and the jury having duly rendered its verdict in favor of the plaintiff, Doralee Estates, Inc., and against the defendant, Cities Service Oil Company, it is

ORDERED and ADJUDGED, that the plaintiff Doralee Estates, Inc. recover of the defendant Cities Service Oil Company the sum of Sixty Thousand ($60,000.00) Dollars, together with interest at six (6%) percent per annum from the 28th day of February, 1973 to January 14, 1977, in the sum of Thirteen Thousand Nine Hundred Forty ($13,940.00) Dollars, as compensatory damages, together with the further sum of Two Hundred Thousand ($200,000.00) Dollars, as punitive damages, making in all the sum

Crouch Law Offices
Route Fifty Two East
Liberty New York 12754

Notary Public, State of New York
Sullivan County Clerk : 41166

of Two Hundred Seventy-Three Thousand Nine Hundred Forty ($273,940.00) Dollars, together with interest from January 14, 1977, the date of verdict, and together with costs when taxed, and it is further

ORDERED and ADJUDGED that third party defendants MGO Corp. and Monticello Gas & Oil Co., Inc. have judgment against the defendant and third party plaintiff, Cities Service Oil Company, dismissing the third party complaint by said Cities Service Oil Company against said third party defendants MGO Corp. and Monticello Gas & Oil Co., Inc.

Dated at New York, New York
this 31st day of January, 1977

RAYMOND F. BURGHARDT
CLERK OF COURT

By: Raymond F. Burghardt
Deputy Clerk
2/3/77

APPROVED:

Richard Owen, U.S.D.J.

~~January~~ , 1977

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STATE OF NEW YORK)
COUNTY OF NEW YORK) ss .

Murray H. Berman, being duly sworn, deposes and says that deponent is not a party to the action, is over 18 years of age and resides at 311 West 97th Street N.Y., N.Y. 10025

That on the 16 day of June, 1977, deponent personally served the within Joint Appendix Volume III of III upon the attorneys designated below who represent the indicated parties in this action and at the addresses below stated which are those that have been designated by said attorneys for that purpose

By leaving 1 true copy of same with a duly authorized person at their designated office.

~~By depositing _____ true copies of same enclosed in a postpaid properly addressed wrapper, in the post office or official depository under the exclusive care and custody of the United States post office department within the State of New York.~~

Names of attorneys served, together with the names of the clients represented and the attorneys' designated addresses

Joseph D. Ahearn, Of Counsel
Grubbs, Leahy & Donovan
Attorneys for Third-Party Defendants-Appellees,
MGO Corp. and Monticello Gas and Oil Co., Inc.
233 Broadway
New York, New York

Murray H Berman

Sworn to before me this
16th day of June, 1977

Michael DeSantis

MICHAEL DeSANTIS
Notary Public, State of New York
No. 03-0930908
Qualified in Queens County
Commission Expires March 30, 1979

Received ~~3~~ 1 copies of the within
Joint Appendix Volume 14 of 14
this 22 day of June, 1977.

Sign [illegible]

For: Gerald Crach Esq(s).

Att'ys for plaintiff

Counsel Press, 55 West 42nd Street